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820
819
No. 2272

United States
Circuit Court of Appeals

For the Ninth Circuit.

**AMERICAN-PACIFIC CONSTRUCTION COM-
PANY, a Corporation,**

Plaintiff in Error,

vs.

**MODERN STEEL STRUCTURAL COMPANY,
a Corporation,**

Defendant in Error.

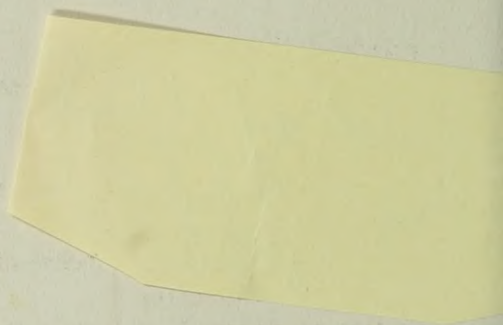
Transcript of Record.

**Upon Writ of Error to the United States District
Court of the Northern District of
California, First Division.**

FILED

JUL 31 1913

Records of U.S. Circuit
Court of appeals
820



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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

Messrs. LENT & HUMPHREY, Attorneys for Plaintiff in Error,

Mills Building, San Francisco, California.

SENECA N. TAYLOR, Esquire, and Messrs. WRIGHT & WRIGHT, Attorneys for Defendant in Error,

Mills Building, San Francisco, California.

In the Circuit Court of the United States, Ninth District, Northern District of California.

MODERN STEEL STRUCTURAL COMPANY, a Corporation,

Plaintiff,

vs.

AMERICAN-PACIFIC CONSTRUCTION COMPANY, a Corporation,

Defendant.

Complaint.

Comes now the above-named plaintiff and for cause of action against the above-named defendant complains and alleges:

I.

That the above-named plaintiff, the Modern Steel Structural Company, is and was at all the times herein mentioned a corporation, organized and existing under and by virtue of the laws of the State of Wisconsin.

II.

That the above-named defendant, the American-

2 *American-Pacific Construction Company*

Pacific Construction Company, is and was at all of the times herein mentioned, a corporation, organized and existing under and by virtue of the Laws of the State of California.

III.

That on the 19th day of January, A. D. 1907, the plaintiff and defendant entered into an agreement in writing, which said agreement is in the words and figures following, to wit:

“Proposal from the Modern Steel Structural Company,

Waukesha, Wis., Jan. 4, 1907.

We propose to furnish you in good order the following described [1*] structural material, constructed in a workmanlike manner, described as follows and in accordance with drawings furnished by Jos. D. Smedberg, and specifications also furnished by Jos. D. Smedberg, standard specifications to govern, identified with marks: ‘Copy #1,’ Initialed, ‘S. E. H. 12/30/06,’ except as noted under ‘RE-MARKS’ on sheet #2 attached.

Namely the structural steel and iron and reinforcing steel, (except the grillage beams, bolts, separators, and column bases mentioned on Page 3 of specifications referred to above) for the Richelieu Realty Syndicate Theatre and Office Building, known as the Columbia Theatre; Location—Southeast corner Van Ness Ave. & Geary St., San Francisco, Cal.

DELIVERY: as follows:—That portion indicated by Mr. Smedberg, shown within red lines on blueprint 3-S, 4-S, 7-S, dated by us on the back of print

*Page-number appearing at foot of page of original certified Record.

as received Dec. 31, and 8-S, dated by us on the back of print as received Jan. 3, 1907, required to begin erection of steel work on stores, to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg.

Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg, from date of approval.

A. P. C. Co. #2.

REMARKS: Our proposition is based on the substitution in part (as referring to 'KIND, CHARACTER AND FINISH OF MATERIAL' beginning page 9, and 'INSPECTION' beginning page 11 of the above specifications) of Manufacturers' Standard Specifications as found in Carnegie's Hand Book.

Mill Test Reports, within said specifications, are proposed as being satisfactory in the above respects to Mr. Smedberg, and upon his request stating upon which portions of the work he will [2] require such reports, we will comply therewith by furnishing same.

PRICE TO BE Seventy-seven (\$77.00) Dollars per ton: Freight allowed to San Francisco, Cal., Correct figured weights of steel to govern amount of sale and all steel work to be accepted at our works by Mr. Smedberg, or his authorized agent.

TERMS OF PAYMENT AS FOLLOWS: 30 days net cash from date of invoices.

Payable in New York, Chicago or Milwaukee Exchange, free of expense to use for the collection charges.

4 *American-Pacific Construction Company*

We are responsible for shop errors in work not erected by ourselves and for alterations, whether erected by ourselves not, only when notified of same in writing before correction is made and given an opportunity and reasonable time to suggest remedy or to ourselves make alterations.

When delays are caused to our men by material or labor not furnished by us, you agree to pay their time, at our regular rates, and their expenses while so delayed.

This contract is contingent upon our ability to procure material from the mills, delays of carriers and upon strikes, accidents or other delays unavoidable or beyond our reasonable control.

It is expressly agreed that there are no premises, agreements or understandings outside of this contract and that no agent or salesman has any authority to obligate the Modern Steel Structural Company, by any terms, stipulations, or conditions not herein expressed.

The title and right of possession to all material we furnish remains with the Modern Steel Structural Company until the same has been fully paid for in cash.

This proposition is for immediate acceptance, but although accepted does not constitute a contract until approved by an executive officer of the Modern Steel Structural Company, and is subject to change or withdrawal so approved. [3]

In case any difference of opinion shall arise between the parties of this contract in relation to the contract, the work to be, or that has been performed

under it, such difference shall be settled by arbitration by two competent persons, one employed by each party of the contract, and these two shall have the power to name an uninterested umpire whose decision shall be binding on all parties to the contract.

In the event that we design this herein mentioned structure or work, furnish strain sheet, or apportion the amount of steel required to perform the work set out by our design herein mentioned, we reserve the right to increase or diminish the amount of material shown, change the design or form of the structure, not affecting its purpose, or disturbing arrangement of other parts of the work or structure, which we may find to the interest of both parties, while work under this contract is in progress. All work done under the foregoing clause is guaranteed by this Company, (ordinary wear and destruction by the elements excepted) for a period of three years against defects in material and workmanship or failure to perform its work as set out by our designs, if notice is given us in writing within thirty days should failure occur under our guarantee, said notice setting forth the immediate cause of such failure of the structure or work.

MODERN STEEL STRUCTURAL COMPANY.

By _____.

Approved by _____.

ACCEPTED January 10th, 1907.

AMERICAN-PACIFIC CONSTRUCTION COMPANY.

_____,
General Manager." [4]

IV.

That the structural material of the kind and character contracted and agreed to be delivered by plaintiff to defendant under the terms of said agreement and necessary for the construction of the Richelieu Realty Syndicate and Office Building mentioned in said agreement amounted to 1500 tons.

V.

That plaintiff immediately upon the making of said agreement, in anticipation of and in preparation for, the fulfillment of its obligations under the terms and conditions of said agreement and for that purpose employed mechanics, laborers and draftsmen, and purchased material to be delivered by plaintiff to defendant and did so arrange and adjust its business that the work of plaintiff at Waukesha, Wisconsin and plaintiff's permanent force of employees, employed in conducting said works, should be employed in constructing said structural material, and did thereupon engage in the construction of said structural material.

VI.

That on or about the 8th day of April, 1907, defendant ordered plaintiff to cease the construction of said structural material, and plaintiff, acting under said orders from defendant, immediately ceased the construction of said structural material.

VII.

That plaintiff at said time, to wit, the 8th day of April, 1907, was actually engaged in the construction of said structural material at its works in Waukesha, Wisconsin, and was at said time ready and willing

to proceed and complete the construction and delivery of said material and perform the obligations to be performed by plaintiff under the terms of said contract, and continued ready and willing to proceed and complete the construction and delivery of said structural material for a reasonable time thereafter, but that said construction ceased wholly at the instance and [5] orders of defendant, and that although a reasonable time has since expired, defendant has never requested or demanded that the construction and delivery of said structural material proceed.

VIII.

That between the said 19th day of January, 1907, when said agreement was entered into and the said 8th day of April, 1907, when said construction was ordered by defendant to cease, plaintiff actually expended for labor necessary in the construction of structural material to be delivered under said agreement the sum of Three Hundred Twenty-eight and 64/100 (\$328.64) Dollars.

IX.

That between the said 19th day of January, A. D. 1907, when said agreement was entered into and the said 8th day of April, 1907, when said construction was ordered by defendant to cease, plaintiff actually expended for labor in making drawings necessary for the construction of said structural material the sum of Six Hundred and Sixty-nine and 28/100 (\$669.28) Dollars.

X.

That between the said 19th day of January, A. D.

1907, when said agreement was entered into and the said 8th day of April, 1907, when said construction was ordered by defendant to cease, plaintiff actually expended for freight and cartage on account of materials used in construction of said structural material the sum of Nine and 23/100 (\$9.23) Dollars.

XI.

That between the said 19th day of January, 1907, when said agreement was entered into, and the said 8th day of April, 1907, when said construction was ordered by defendant to cease, plaintiff purchased 78,470 lbs. of steel at an actual cost to plaintiff of One Thousand Four Hundred and Ninety and 93/100 (\$1490.93) Dollars, which said steel was actually used by plaintiff in the construction [6] of structural material and delivered to defendant under the terms of said agreement and by said defendant accepted.

XII.

That between the said 19th day of January, 1907, when said agreement was entered into, and the said 8th day of April, 1907, when said construction was ordered by defendant to cease, in addition to the 78,470 lbs. of steel purchased as aforesaid by plaintiff, plaintiff purchased 244,065 lbs. of steel at an actual cost to plaintiff of Four Thousand Six Hundred and Sixty-three and 29/100 (\$4,663.29) Dollars, which said steel was necessary and was purchased for the construction of the structural material to be delivered under the terms of said agreement, and was cut to sizes and lengths adopted for the construction of the structural material to be furnished

under the terms of said agreement, and by reason thereof cannot be used for other purpose without great cost to the plaintiff and is of no greater value at the present time than the sum of Three Thousand Seven Hundred and Thirty and $64/100$ (\$3,730.64) Dollars, and said purchase has therefore resulted in a loss to plaintiff in the sum of Nine Hundred and Thirty-two and $65/100$ (\$932.65) Dollars.

XIII.

That between the 19th day of January, 1907, when said agreement was entered into, and the said 8th day of April, 1907, when said construction was ordered to be ceased, in addition to the sums heretofore mentioned as having been expended by plaintiff, plaintiff actually expended in the construction of the said structural material, for the maintenance and operation of plaintiff's said works and the service of plaintiff's permanent employees the sum of One Hundred and Seventy-nine and $03/100$ (\$179.03) Dollars.

XIV.

That in addition to the sums of money hereinbefore alleged to have been paid by plaintiff, plaintiff subsequent to the 8th [7] day of April, 1907, when said construction was ordered to be ceased by defendant, was compelled to expend, and did actually expend, the sum of Six Thousand Six Hundred and Sixty-four and $50/100$ (\$6,664.50) Dollars on account of expenses incurred by plaintiff growing out of the plaintiff's direct preparation for the construction of the structural material to be delivered by plaintiff to defendant under the terms of said agreement.

XV.

That the profits which plaintiff would have made from the construction and delivery of said structural material under the terms of said agreement had plaintiff been permitted to have completed construction and delivery to defendant of said structural material under the terms and conditions of said agreement and said construction had not been stopped by defendant as aforesaid, would have amounted to the sum of Twenty Thousand Six Hundred and Six and $47/100$ (\$20,606.47) Dollars, and plaintiff has by reason of the cessation as aforesaid of said construction and delivery of said structural material at the orders and request of defendant been deprived of said profits.

XVI.

That plaintiff, by reason of the cessation as aforesaid of the construction and delivery of said structural material, at the orders and request of defendant has been damaged in the sum of Thirty Thousand Eight Hundred and Eighty-one and $23/100$ (\$30,881.23) Dollars.

WHEREFORE plaintiff prays judgment against the above-named defendant for the sum of Thirty Thousand Eight Hundred and Eighty-one and $23/100$ (\$30,881.23) Dollars and for costs of suit.

KEOGH and OLDS,

Attorneys for Plaintiff. [8]

State of California,

City and County of San Francisco,—ss.

Lee M. Olds, being duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in

the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on his information or belief and as to those matters that he believes it to be true.

That he makes this affidavit for and in behalf of plaintiff, and for the said reason that plaintiff is at the date hereof outside of the State of California.

That the plaintiff and its agents, officers and servants are outside of the State of California.

LEE M. OLDS.

Subscribed and sworn to before me this 28th day of April, 1908.

[Seal]

J. J. KERRIGAN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed April 28, 1908. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.
[9]

*Circuit Court of the United States, Ninth Judicial
Circuit, Northern District of California.*

MODERN STEEL STRUCTURAL COMPANY, a
Corporation,

Plaintiff,

vs.

AMERICAN-PACIFIC CONSTRUCTION COM-
PANY, a Corporation,

Defendant.

Summons.

UNITED STATES OF AMERICA.

Action brought in the said Circuit Court and the complaint filed in the office of the Clerk of the said Circuit Court, in the City and County of San Francisco.

KEOGH and OLDS,
Attorneys for Plaintiff.

The President of the United States of America,
Greeting: To American-Pacific Construction Company, a Corporation, Defendant.

YOU ARE HEREBY DIRECTED TO APPEAR and answer the complaint in an action entitled as above, brought against you in the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California, within ten days after the service on you of this Summons—if served within this County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or it will apply to the Court for any other relief demanded in the complaint.

WITNESS the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 28th day of April, in the year of our Lord one thousand

nine hundred and eight and of our Independence the
132d.

SOUTHARD HOFFMAN,
Clerk.

By J. A. Schaertzer,
Deputy Clerk. [10]

United States Marshal's Office,
Northern District of California.

I HEREBY CERTIFY that I received the within
Summons on the 14th day of May, 1908, and personally
served the same on the 14th day of May, 1908,
upon American-Pacific Construction Company, a corporation,
the defendant therein named, by delivering to and leaving with W. P. Humphrey, attorney
for said American-Pacific Construction Co., said defendant
named therein personally at the County of
San Francisco in said District, a copy thereof, together
with a copy of the Complaint, attached thereto.

C. T. ELLIOTT,
U. S. Marshal.

By Paul J. Arnerich,
Deputy.

Dated at San Francisco, this 14th day of May, 1908.

[Endorsed]: Filed June 19th, 1908. Southard
Hoffman, Clerk. By W. B. Maling, Deputy Clerk.
[11]

*In the Circuit Court of the United States, Ninth District,
Northern District of California.*

No. 14,716.

MODERN STEEL STRUCTURAL COMPANY, a
Corporation,

Plaintiff,

vs.

AMERICAN-PACIFIC CONSTRUCTION COM-
PANY, a Corporation,

Defendant.

Demurrer to Complaint.

Defendant demurring to the complaint of plaintiff
on file herein and as grounds of demurrer assigns:

I.

That said complaint does not state facts sufficient
to constitute a cause of action against this defendant.

II.

That said complaint is uncertain in each, every and
all of the following particulars:

(a) It does not appear, nor can it be ascertained
from said complaint, that the said alleged agreement
set forth in paragraph III thereof was ever signed or
executed by either the plaintiff or the defendant.

(b) It does not appear, nor can it be ascertained
from said complaint, what were or are the "remarks"
referred to in said alleged agreement.

(c) It does not appear from said complaint,
whether or not the said alleged contract set forth
in paragraph III thereof was ever approved by any
executive officer of the plaintiff. [12]

(d) It does not appear, nor can it be ascertained from said complaint, whether or not the plaintiff acquiesced in the said alleged order of defendant and consented to the cancellation of said contract.

(e) It does not appear, nor can it be ascertained from said complaint, that the various items of expenditures mentioned in Paragraph VIII, IX, X and XI thereof were necessarily incurred by plaintiff by reason of any action of the said defendant.

(f) It does not appear, nor can it be ascertained from said complaint, how or in what manner defendant compelled plaintiff to cease doing work under the said alleged contract or whether or not plaintiff and defendant consented to abandon the said alleged contract.

(g) It does not appear, nor can it be ascertained from said complaint, whether or not defendant endeavored to dispose of the steel mentioned in paragraph XII of said complaint at any time subsequent to the 8th day of April, 1907, and the commencement of this action, nor does it appear that the said steel between said dates was not of greater value than \$4,663.29.

(h) It does not appear, nor can it be ascertained from said complaint, what are the items of maintenance and operation referred to in paragraph XIII of said complaint, for which plaintiff alleges it expended the sum of \$179.03.

(i) It does not appear, nor can it be ascertained from said complaint, what were the expenses alleged to have been expended, in paragraph XIV to amount to \$6,664.50, growing out of its direct preparation for

the contract or the structural material to be delivered to defendant.

(j) It does not appear, nor can it be ascertained from said complaint what are the items of the alleged profit. [13]

(k) It does not appear, nor can it be ascertained from said complaint, how the profits plaintiff alleges it would have made from the construction and delivery of the said structural material amounted to \$20,606.47.

(l) It does not appear, nor can it be ascertained from said complaint, that any profits would have been made by plaintiff in the performance of said contract.

(m) It does not appear, nor can it be ascertained from said complaint, how plaintiff has been damaged in the sum of \$3,881.23, or in any other sum, by any act or action of defendant, nor does it appear, nor can it be ascertained from said complaint, of what items the aggregate sum of \$30,881.23 is composed.

III.

That said complaint is ambiguous in each, every and all of the particulars set forth in paragraph II of this demurrer.

IV.

That said complaint is unintelligible in each, every and all of the particulars set forth in paragraph II of this demurrer.

WHEREFORE said defendant prays to be hence dismissed with its costs.

J. M. & H. L. ROTHCHILD,
WILLIAM F. HUMPHREY,
LENT & HUMPHREY,

Attorneys for Defendant.

We and each of us hereby certify that in our opinion the foregoing demurrer to said complaint, and each and every ground of said demurrer is well founded in point of law.

J. M. & H. L. ROTHCHILD,
J. M. ROTHCHILD.
LENT & HUMPHREY,
WILLIAM F. HUMPHREY.

Due service and receipt of a copy of the within Demurrer is hereby admitted this 23d day of July, 1908.

KEOGH & OLDS,

Attorneys for Plaintiff. [14]

[Endorsed]: Filed July 23, 1908. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.
[15]

At a stated term, to wit: the July term, A. D. 1908, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the 28th day of September, in the year of our Lord one thousand nine hundred and eight. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 14,716.

MODERN STEEL STRUCTURAL CO.

vs.

AMERICAN-PACIFIC CONSTRUCTION CO.

Order Sustaining Demurrer.

Upon motion on behalf of plaintiff and by consent of both sides, it is ordered that defendant's demurrer to the complaint herein be and the same is hereby sustained, with leave to the plaintiff to amend within ten days. [16]

In the Circuit Court of the United States, Ninth District, Northern District of California.

MODERN STEEL STRUCTURAL COMPANY (a Corporation),

Plaintiff,

vs.

AMERICAN-PACIFIC CONSTRUCTION COMPANY (a Corporation),

Defendant.

Amended Complaint.

By leave of Court first had and obtained, now comes plaintiff and files this his amended complaint in this action and complains of defendant, and for cause of action alleges:

I.

That the above-named plaintiff, the Modern Steel Structural Company, is and was at all the times herein mentioned, and now is, a corporation organized and existing under and by virtue of the laws of

the State of Wisconsin.

II.

That the above-named defendant, the American-Pacific Construction Company, is and was at all the times herein mentioned, and now is, a corporation organized and existing under and by virtue of the laws of the State of California.

III.

That on or about the 19th day of January, 1907, plaintiff and defendant made and entered into a contract in substance as follows: Plaintiff agreed to furnish and deliver (as near as plaintiff and defendant could estimate) fifteen hundred (1500) tons of structural steel and iron and re-inforcing steel structural material to defendant at San Francisco, California, which material was to be used by said defendant in the construction and erection of the Richelieu [17] Realty Syndicate and Office Building, known as the "Columbia Theatre," on lot of land situated at the southeast corner of Geary Street and Van Ness Avenue, in the City and County of San Francisco. Plaintiff was to deliver said material without delay. All of said material was to be delivered to said defendant before September 1, 1907. The price to be paid for said material by defendant to plaintiff was Seventy-seven (\$77.00) Dollars per ton; all to be paid for by defendant thirty days from date of invoices.

IV.

That after making and entering into said contract said defendant (sent a representative to the works of plaintiff at Waukesha, Wisconsin, and) requested

plaintiff to arrange its plant to make deliveries of said material as rapidly as possible. That plaintiff immediately upon the making of said request, employed mechanics, laborers and draftsmen and purchased and prepared material called for in said contract to be delivered by plaintiff to defendant, and did so arrange and adjust its business and works at Waukesha, Wisconsin, to meet said request of said defendant.

V.

That after the making of said contract and after plaintiff's works and plant and force of employees had been arranged and prepared to carry out plaintiff's part of said contract, and after plaintiff had actually shipped to said defendant from said works at Waukesha, Wisconsin, to San Francisco, California, more than thirty tons of said fifteen hundred tons of said material to be constructed and delivered by plaintiff to defendant as stated in said contract, said defendant thereafter and on or [18] about the 8th day of April, 1907, notified plaintiff in substance as follows:

“Stop all shipments and work in shop Columbia Theatre job until further notice.

AMERICAN-PACIFIC CONSTRUCTION
COMPANY.”

That thereafter and on or about the 9th day of April, 1907, in reply to the said notice above set forth, plaintiff notified defendant in substance as follows:

“You do not ask us to stop letting the material come from the mills, which was on order, or do you

ask us to stop progress on the drawings. We presume there is some reason for stopping progress. Will be pleased to know if you have any, or have written us what to expect, inasmuch as it interferes seriously with our progress now that is well under way.

MODERN STEEL STRUCTURAL COMPANY,

By S. B. HARDING."

That in reply to the above notice of the plaintiff, defendant thereafter and on or about the 15th day of April, 1907, notified plaintiff that the Columbia Theatre building, for which plaintiff was to furnish said material mentioned in this complaint, would not be erected, which notice was in substance as follows:

"Stop everything on Columbia Building. Will not be erected.

AMERICAN-PACIFIC CONSTRUCTION COMPANY."

—and did at said time, to wit, on or about the 15th day of April, 1907, further notify plaintiff, the substance of which is as follows:

"The Richelieu Realty Syndicate have practically no money to complete their building and they are trying to organize a new company, and when their organization is complete, there is no doubt but that they will erect a Class "C" building, with wooden joists and brick, and in the meantime we are waiting to hear from [19] you by wire the outside cost up to date, so we can arrange a settlement with your company.

In making this estimate, please bear in mind that

we are going to have quite a heavy loss in any event, and we would like to have you put your material and time down as near cost as you can.

AMERICAN-PACIFIC CONSTRUCTION
COMPANY.

Per THOMAS VIGUS,
General Manager."

That thereafter and on or about the 21st day of April, 1907, and in answer to the last notice above mentioned and as requested therein by defendant, plaintiff wired said defendant in substance as follows:

"Will cancel contract Columbia Theatre job and settle entire matter with you for the sum of Thirty Thousand Two Hundred Thirty (\$30,230.00) Dollars."

That to said telegram defendant made no reply.

That thereafter and on or about the 25th day of April, 1907, plaintiff, in writing and in further response to defendant's said notice on or about the 15th day of April, 1907, requesting plaintiff to wire outside cost to date, notified defendant in substance as follows:

"The Thirty Thousand Two Hundred Thirty (\$30,230.00) Dollar cancellation price given you includes material, labor and operating expenses and our loss to that date. We were fortunate enough to stop rolling on considerable of the material; other material we will have to accept and pay for. The invoice for the material shipped to Frisco will be credited of course on the cancellation price, when settlement in that amount is made.

We have not heard any particulars since we gave you this price and stopped all work, which has made a big vacancy in our workshop and of course a serious loss there. Hope that you can make some speedy settlement of this matter, so that we can get our money out of it.” [20]

That defendant further notified plaintiff in substance as follows:

“There is one thing absolutely certain, the Columbia Theatre building will not be erected, and it is simply up to us to find out how far you have gone.”

That said defendant declined to and has refused to pay plaintiff the said sum of Thirty Thousand Two Hundred and Thirty (\$30,230.00) Dollars, the sum for which plaintiff agreed to and offered to settle with defendant.

That said defendant refused to permit plaintiff to carry out said contract on plaintiff's part to be performed, without fault on the part of plaintiff, plaintiff having the ability to and being at all times herein mentioned ready and willing to perform and carry out its part of said contract, but notwithstanding plaintiff's readiness and willingness to perform and carry out its part of said contract (which fact plaintiff stated to said defendant) defendant has, as herein mentioned, refused and now does refuse to permit plaintiff to carry out plaintiff's part of said contract, and all against the will and wish of said plaintiff and to the damage of plaintiff as herein stated.

VI.

That defendant has at all times herein mentioned and does now refuse to pay or settle with plaintiff

for the loss and damage suffered by plaintiff by reason of defendant refusing to allow or permit plaintiff to carry out its part of said contract or to pay or settle with plaintiff for the part of said contract performed by plaintiff, and said defendant has refused to permit plaintiff to perform all of plaintiff's part of said contract.

That because of and by reason of the failure of defendant to carry out and perform its part of said contract as in this complaint stated and for no other reason, plaintiff has been actually damaged in the sums as hereinafter stated. [21]

Actual cost to plaintiff for material shipped to defendant \$1,490.93.

Actual and necessary expenditure for labor by reason of said contract \$997.92.

Actual and necessary expenditure for freight \$9.73.

Actual cost to plaintiff, in addition to the above sums, by reason of loss on purchase of 244,065 pounds of structural material purchased and not used or shipped to defendant, all of which was necessary for plaintiff to purchase and to use in carrying out its part of said contract, the sum of \$932.65.

Actual and necessary expense, in addition to the sums above mentioned, expended by plaintiff in maintenance and operation of plaintiff's said works, \$6,843.53.

That in addition to the sums of money above mentioned plaintiff has been deprived of the profit which plaintiff would have made from the said plant and business had defendant fulfilled its part of said contract and permitted plaintiff to have performed its

part of said contract. That after making said contract and prior to the 1st day of April, 1907, the plant, work and business of plaintiff at Waukesha, Wisconsin, at the request of said defendant, was arranged and adjusted so as to construct, furnish and deliver the said material to be delivered and furnished, as stated in this complaint, by plaintiff to said defendant before the 1st day of September, 1907. That immediately upon said plant, work and business being so arranged as aforesaid, plaintiff actually commenced the construction and delivery of said material; that after plaintiff's plant and business had been so arranged, plaintiff was unable at any time after the construction and delivery of said material by plaintiff was stopped by said defendant, as in this complaint stated, to secure or substitute after due diligence work or contracts to take the place of work contracted for in said contract to be furnished by plaintiff to [22] said defendant, until after the 1st day of September, 1907. That had it not been for the aforesaid contract and arrangement with said defendant, plaintiff could have taken and actually had other work to do amounting to more than \$120,000.00, which said other work required delivery to be made by September 1, 1907, and this plaintiff, having said contract with defendant, could not do. Had plaintiff not had said contract with said defendant, plaintiff could and would have taken said other work, and would actually made out of the same, clear of all expense, the sum of Twenty-five Thousand (\$25,000.00) Dollars. That had defendant carried out its part of said contract

and permitted plaintiff to have carried out its part of said contract, plaintiff would have actually made out of said contract the sum of Twenty Thousand Six Hundred and Six and 47/100 (\$20,606.47) Dollars, clear of all expense. Plaintiff not being permitted to carry out its part of said contract by said defendant, and not being able to take any more work, because of said contract with said defendant, all of which was caused by said defendant (as in this complaint stated), plaintiff was actually damaged in a sum to exceed Twenty Thousand Six Hundred and Six and 47/100 (\$20,606.47) Dollars, and all because of the failure of said defendant to carry out and perform its part of said contract, and because of said contract, as in this complaint stated.

VII.

That each and all of the aforesaid damages suffered by plaintiff was actually caused by aforesaid acts of said defendant and by said failure of said defendant to carry out and perform its part of said contract, as in this complaint stated, and through no other cause.

VIII.

That defendant at all times herein mentioned has and now does refuse to perform and carry out its part of said contract; all without fault of the plaintiff and to the damage of plaintiff [23] as in this complaint stated.

WHEREFORE, plaintiff prays judgment against the above-named defendant for the sum of Thirty Thousand Eight Hundred and Eighty-one and 23/100

(\$30,881.23) Dollars and for costs of suit.

KEOGH and OLDS,
Attorneys for Plaintiff.

Of Counsel:

[24]

State of California,
City and County of San Francisco,—ss.

Lee M. Olds, being duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on his information or belief and as to those matters that he believes it to be true.

That he makes this affidavit for and in behalf of plaintiff and for the said reason that plaintiff is at the date hereof outside of the State of California.

That the plaintiff and its agents, officers and servants are outside of the State of California.

LEE M. OLDS.

Subscribed and sworn to before me this 30th day of November, A. D. 1908.

[Seal]

H. B. DÉNSON,
Notary Public in and for the City and County of San Francisco, State of California.

Due service of the within Amended Complaint and receipt of copy thereof admitted this 30th day of November, 1908.

LENT & HUMPHREY,
Attorneys for Defendant.

[Endorsed]: Filed December 5th, 1908. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [25]

In the Circuit Court of the United States, Ninth District, Northern District of California.

No. 14,716.

MODERN STEEL STRUCTURAL COMPANY, a
Corporation,

Plaintiff,

vs.

AMERICAN-PACIFIC CONSTRUCTION COM-
PANY, a Corporation,

Defendant.

Demurrer to Amended Complaint.

Defendant demurs to the amended complaint of plaintiff on file herein and as grounds of demurrer assigns:

I.

That said amended complaint does not state facts sufficient to constitute a cause of action against this defendant.

II.

That said amended complaint is uncertain in each, all and every of the following particulars:

(a) It does not appear nor can it be ascertained from said amended complaint what were the terms of the contract referred to in said amended complaint, or whether or not it is the same contract referred to and set forth in the original complaint of plaintiff on file herein.

(b) It does not appear nor can it be ascertained from said amended complaint whether the plaintiff relied on suing in *quantum meruit* for the value of the work and labor done and materials furnished by it, or breach of contract.

(c) It does not appear nor can it be ascertained from said amended complaint when the request referred to in paragraph IV was made, or to what extent the said defendant complied therewith. [26]

(d) It does not appear nor can it be ascertained from said amended complaint how or in what respect defendant refused to permit plaintiff to carry out plaintiff's part of said alleged contract, or whether or not the said plaintiff was ready, willing or able to perform said contract.

(e) It does not appear nor can it be ascertained from said amended complaint what were the various items of cost or expense referred to in paragraph VI of said complaint, or whether or not the same were necessarily incurred.

(f) It does not appear nor can it be ascertained from said amended complaint what profit the said plaintiff would have made, or could have made, had it not been engaged in the performance of said alleged contract.

(g) It does not appear nor can it be ascertained from said amended complaint how or in what manner the said plaintiff was prevented by the said defendant from earning said profits, or how or in what manner said defendant committed a breach of said alleged contract.

(h) It does not appear nor can it be ascertained

from said amended complaint that the said plaintiff has been at all damaged by any act of said defendant.

III.

That said amended complaint is ambiguous in each, every and all of the particulars set forth in paragraph 11 of this demurrer.

IV.

That said amended complaint is unintelligible in each, every and all of the particulars set forth in paragraph II of this demurrer.

WHEREFORE, said defendant prays to be hence dismissed with its costs.

J. M. & H. L. ROTHCHILD,
LENT & HUMPHREY,

Attorneys for Defendant.

We, and each of us, hereby certify [27] that in our opinion, the foregoing demurrer to said complaint, and each and every ground of said demurrer, is well founded in point of law.

LENT & HUMPHREY.

J. M. & H. L. ROTHCHILD.

Due service and receipt of a copy of the within Demurrer is hereby admitted this 4th day of December, 1908.

KEOGH and OLDS,
Attorneys for Plaintiff.

[Endorsed] : Filed December 4, 1908. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.
[28]

At a stated term, to wit, the November term, A. D. 1908, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the 7th day of December, in the year of our Lord one thousand nine hundred and eight. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 14,716.

MODERN STEEL STRUCTURAL CO.

vs.

AMERICAN-PACIFIC CONSTRUCTION CO.

**Order Overruling Demurrer to Amended Complaint,
etc.**

Defendant's demurrer to the amended complaint and defendant's motion to strike out parts of the amended complaint herein came on this day to be heard, and by consent of counsel for both sides said demurrer and said motion to strike out were submitted to the Court without argument, whereupon it was ordered that said demurrer to the amended complaint be, and the same was hereby overruled, and said motion to strike out be and the same was hereby denied, with leave to the defendant to answer within thirty days. [29]

In the Circuit Court of the United States, Ninth District, Northern District of California.

MODERN STEEL STRUCTURAL COMPANY, a
Corporation,

Plaintiff,

vs.

AMERICAN-PACIFIC CONSTRUCTION COMPANY, a Corporation,

Defendant.

Answer.

Defendant above named answering the amended complaint of plaintiff on file herein denies and avers as follows:

I.

Defendant avers it has no information or belief upon the subject sufficient to enable it to answer the allegation in paragraph I of said amended complaint; and placing its denial on that ground denies that the plaintiff above named is, or was at all the times herein or in said amended complaint mentioned, or now is, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, or of any other State.

II.

Denies that on or about the 19th day of January, 1907, or on or about any other date, plaintiff or defendant made or entered into any contract; denies that plaintiff or defendant entered into a contract in substance or at all as set forth in paragraph III of plaintiff's amended complaint.

III.

Denies that before or after making or entering into said or any contract, or at all, said defendant sent a representative to the works of plaintiff at Waukesha, Wisconsin, or elsewhere, or [30] requested plaintiff to arrange its plant to make delivery of the said alleged material, or of any material, as rapidly as possible, or at all; defendant has no information or belief upon subject sufficient to answer the allegations contained in paragraph IV of said amended complaint, to wit: that plaintiff immediately upon the making of said request, employed mechanics, laborers and draftsmen, and purchased and prepared material called for in said contract to be delivered by plaintiff to defendant, and did so arrange and adjust its business and works at Waukesha to meet said request of said defendant, and placing its denial on that ground denies that any request was made of plaintiff as set forth in said alleged paragraph IV of plaintiff's amended complaint; denies that immediately upon the making of said or any request or at any time, plaintiff employed mechanics, or mechanic, laborers or laborer, draughtsmen or draughtsman, or purchased or prepared any material to be delivered by plaintiff to defendant, or did so or at all arrange or adjust its business or works to meet said or any requirements of defendant.

IV.

Denies that after the making of said or any contract, or after plaintiff's works or plant or force of employees had been arranged or prepared to carry out its part of said alleged contract, or after plaintiff

actually shipped to the defendant more than thirty tons of said 1500 tons of said material, or any of said material, defendant, on or about the 8th day of April, 1907, or at any other time, or at all, notified plaintiff in substance or at all, as set forth in paragraph V of said complaint; defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the various allegations set forth in said paragraph 5, and placing its denial on that ground denies that the alleged communications set forth in plaintiff's amended complaint were sent by or received by the said defendant. [31]

Defendant admits that it declined to and has refused to pay plaintiff the sum of \$32,230, or any other sum, and admits that the plaintiff agreed to and offered to settle its alleged claim against said defendant for said sum of money, but defendant refused to accept such offer and refused to pay said sum, or any other sum, alleged to be due plaintiff, whereas no money or sum is due to said plaintiff from this defendant.

Defendant denies that it refused to permit plaintiff to carry out said, or any, contract on plaintiff's part to be performed or without fault on the part of plaintiff; denies that said or any contract was not performed without fault on the part of plaintiff; denies that plaintiff had the opportunity to perform or carry out its part of the said alleged contract or any contract; denies that the said plaintiff was ready or willing, at all or any of the times mentioned in said complaint, to perform or carry out its part of said alleged contract; denies that the plaintiff ever stated

to the said defendant that it had the ability to, or was ready or willing to perform or carry out its part of said contract; denies that this defendant has refused or does now refuse to permit plaintiff to carry out its part of said contract; denies that all or any of the acts of said defendant or against the will or wish of the said plaintiff or to the damage of plaintiff as in said amended complaint stated, or at all.

V.

Denies that the plaintiff has suffered any loss or damage by the alleged action of defendant in refusing to allow or permit it to carry out its part of said alleged contract; denies that said plaintiff has been damaged by defendant's refusal to pay, or settle with plaintiff for its alleged claim, or of the part of said alleged contract which plaintiff claims to have performed; denies that defendant has refused to permit plaintiff to perform all of its part of said contract; denies that because [32] of or by reason of the failure of defendant to carry out or perform its part of said or any contract, either as in this amended complaint stated, or otherwise, or for any other reason or cause whatsoever, plaintiff has been actually, or at all, damaged in the sum, or any of the sums stated in paragraph VI of said amended complaint; denies that the sum of \$1,490.93 was the actual or any cost to plaintiff of the materials alleged to have been shipped to defendant; denies that the sum of \$997.92 was, or is, the actual or necessary expenditure for labor by reason of said contract, or by any other reason whatsoever. Denies \$9.73 was the actual or necessary expenditure for freight; denies

that plaintiff purchased 244,065 pounds of structural material which was not used or shipped to defendant; denies that by reason thereof, or for any other reason, plaintiff was damaged in the sum of \$932.65; denies that plaintiff expended the sum of \$6,843.53 for maintenance or operation of said plaintiff's said works, or that said sum is an actual or necessary or any expenditure against said contract; denies that in addition to the other sums mentioned in plaintiff's amended complaint plaintiff has been deprived of the profits which plaintiff would have made from the said plant or business had defendant fulfilled its part of said contract, or permitted plaintiff to perform its part of said contract; denies that plaintiff would have made any profits from said alleged contract if said alleged contract had been performed or fulfilled by plaintiff.

Defendant upon its information or belief denies that after its making said or any contract or prior to the first day of April, 1907, or at any other time, the plant, works or business or the plant, work or business of plaintiff at Waukesha, Wisconsin, either at the request of said defendant or otherwise, was arranged or adjusted so as to construct, furnish or deliver the said [33] alleged material to be delivered or furnished, or any materials, by plaintiff to said defendant before the first day of September, 1907; defendant, according to its information and belief, denies that said plant, work or business had been so arranged, or that immediately upon said work or business being so arranged or at any other time, plaintiff actually commenced the construction of said

material; denies that plaintiff was unable to secure or substitute work or contract to take the place of the work alleged to have been contracted for in said contract with defendant after the alleged construction or delivery was stopped by said defendant, or until after the first of September, 1907; denies that plaintiff used due or any diligence to secure other work or contract to take the place of the alleged work or any contract; denies that had it not been for the said alleged contract or arrangement with defendant, plaintiff could have taken or actually or otherwise had other work amounting to more than \$120,000; denies that such other work required delivery to be made by the first of September, 1907; denies that plaintiff could not make such delivery by reason of the alleged contract with defendant; denies that plaintiff could or would have taken said other work had it not had said alleged contract with defendant or would have actually or otherwise, or at all, made out of the same, clear of all expense or otherwise, the sum of \$25,000; denies that defendant did not carry out its part of said alleged contract; denies that had defendant carried out its part of said contract or permitted plaintiff to carry out its part of said alleged contract, plaintiff would have made, actually or otherwise, or at all, out of said contract the sum of \$20,606.47 or any other sum, clear of all expenses or otherwise; denies that plaintiff was not permitted to carry out its part of said contract; denies that plaintiff was not able to take any more work either because of said alleged contract with defendant or otherwise, or at all; denies that plaintiff was

actually or at all damaged in a sum [34] in excess of \$20,606.47, or in any other sum, or at all; either because of the failure of defendant to carry out or perform its part of said contract or because of said contract or because of any other reason or action of this defendant, or anyone else; denies that each, any or all of the alleged damages stated in said complaint to have been suffered by plaintiff were or was actually or at all caused by any acts or act of defendant or by its failure to carry out or perform its part of said or any contract; denies that any of the alleged damages claimed by said plaintiff to have been suffered or sustained by plaintiff through the causes set forth in said amended complaint, or through any cause, or at all, were or was actually caused by all or any of the acts of said defendant or by all or any of the acts set forth in said amended complaint, or by all or any of the acts set forth in plaintiff's amended complaint, or by defendant's failure to carry out or perform its part of said contract or by any other reason or cause.

VI.

Denies that at all or any of the times in said amended complaint mentioned, defendant has, or now does refuse to perform or carry out its part of said or any contract; denies that any of the matters set forth in said complaint is or are without the fault of plaintiff, or to the damage of plaintiff in any sum whatsoever, or at all.

WHEREFORE, said defendant prays to be hence dismissed with its costs.

LENT & HUMPHREY,
Attorneys for Defendant. [35]

In the Circuit Court of the United States, Ninth District, Northern District of California.

MODERN STEEL STRUCTURAL COMPANY, a
Corporation,

Plaintiff,

vs.

AMERICAN-PACIFIC CONSTRUCTION COMPANY, a Corporation,

Defendant.

Stipulation as to Answer.

It is hereby stipulated and agreed by and between the parties hereto, that the defendant AMERICAN-PACIFIC CONSTRUCTION COMPANY, a corporation, may file the foregoing unverified answer in lieu of an answer consisting of specific denials and verified in the manner and form required by Section 446 of the Code of Civil Procedure of the State of California, and the rules of the above-entitled court.

It is understood and agreed that the above-named defendant will on thirty days' notice from plaintiff file a verified answer consisting of specific denials, and such other affirmative or other defenses as it may see fit to urge.

Dated July 7, 1909.

KEOGH & OLDS,

Attorneys for Plaintiff.

LENT & HUMPHREY,

Attorneys for Defendant.

Received copy of the within Answer this 12th day of July, 1909.

KEOGH & OLDS,

Attys. for Plaintiff.

[Endorsed]: Filed July 13, 1909. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.
[36]

*In the Circuit Court of the United States, Ninth District,
Northern District of California.*

#14,716.

MODERN STEEL STRUCTURAL COMPANY, a
Corporation,

Plaintiff,

vs.

AMERICAN-PACIFIC CONSTRUCTION COMPANY, a Corporation,

Defendant.

Notice of Motion to File Amended Complaint.

Please take notice that the above plaintiff will move the above court, at the courtroom of said court, in the postoffice Building, situated at the corner of Seventh and Mission Streets, in the City and County of San Francisco, State of California, on Monday, the 28th day of March, 1910, at the hour of 10 o'clock A. M., or as soon thereafter as plaintiff can be heard, for an Order permitting plaintiff to file in this cause an Amended Complaint, a copy of which Amended Complaint is hereto attached, upon such conditions as may appear to this Court just and equitable and serve the ends of justice, as permitted by law and the rules of this Court; said motion will be presented on all papers and pleadings on file in this cause, together with this notice and the Amended Complaint hereto attached, and on the grounds that it is neces-

sary for plaintiff to file such Amended Complaint to present and prosecute its cause of action herein.

Dated this 22d day of March, A. D. 1909.

KEOGH and OLDS,

SENECA N. TAYLOR,

Attorneys for Plaintiff.

To Messrs. LENT & HUMPHREY, Attorneys for Defendant. [37]

Service and receipt of a copy of the within Notice of Motion to File Amended Complaint, this 22d day of March, A. D. 1910, is hereby admitted.

LENT & HUMPHREY,

Attorneys for Defendant.

[Endorsed]: Filed Mar. 25, 1910. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [38]

At a stated term, to wit, the July term, A. D. 1910, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Thursday, the 20th day of October, in the year of our Lord one thousand nine hundred and ten. Present: The Honorable WILLIAM C. VAN FLEET, Judge.

No. 14,716.

MODERN STEEL STRUCTURAL CO.

vs.

AMERICAN-PACIFIC CONSTRUCTION CO.

Order Granting Motion for Leave to File Second Amended Complaint.

Plaintiff's motion for leave to file a second amended complaint heretofore heard and submitted, and the Court having rendered its oral opinion thereon, it was ordered that said motion be and the same is hereby granted, on condition that the plaintiff pay the sum of fifty dollars (\$50.00) to the attorneys for the defendant. Plaintiff's motion for a commission to issue to depositions heretofore heard and submitted, and the Court having rendered its oral opinion thereon, it was ordered that said motion be and the same is hereby denied, without prejudice.

[39]

In the Circuit Court of the United States, Ninth District, Northern District of California.

MODERN STEEL STRUCTURAL COMPANY, a
Corporation,

Plaintiff,

vs.

AMERICAN-PACIFIC CONSTRUCTION COM-
PANY, a Corporation,

Defendant.

Second Amended Complaint.

Comes now the plaintiff in the above-entitled cause, and, by leave of Court, files this, its second amended complaint, and avers that at all the times hereinafter mentioned it was and still is a corporation, organized under the laws of the State of Wisconsin, and a resi-

dent and citizen of the State of Wisconsin; that at all the time hereinafter mentioned the defendant was and still is a corporation organized under the laws of the State of California, and a citizen of California, and at all of said times having its principal office, residence and domicile in the City of San Francisco in said District, and that the matter in dispute in this cause, exclusive of interest and costs, exceeds the sum of Twenty Thousand Dollars (\$20,000.00).

AND PLAINTIFF, FOR ITS CAUSE OF ACTION, AVERS:

I.

That on or about the 19th day of January, 1907, plaintiff and defendant entered into a contract by the terms of which plaintiff agreed with the defendant to furnish material for and to fabricate all the structural steel and iron required by the plans and specifications, as the same then indicated, for the new building to be erected by the defendant for the Richelieu Realty Syndicate, known as the "Columbia Theatre" on lot of land situated on the [40] southeast corner of Geary Street and Van Ness Avenue, in the City and County of San Francisco, and to deliver said material, when so fabricated, to defendant, f. o. b. cars, San Francisco, California, at the agreed price of Seventy-seven Dollars (\$77.00) per ton; that the quantity of such structural steel and iron required for said building about to be erected and which plaintiff sold to the defendant for future delivery was estimated at fifteen hundred (1500) tons, and that by said contract plaintiff agreed

to deliver all such material to defendant before September 1, 1907.

II.

That by the terms of said contract defendant purchased from plaintiff for future delivery and agreed to accept from plaintiff the quantity of structural steel indicated and called for by the plans and specifications for said building, which quantity it was mutually agreed between plaintiff and defendant was about fifteen hundred (1500) tons; that said defendant, at said time, was under contract with the owners of said new building for the erection thereof, and defendant agreed to accept from plaintiff and pay plaintiff for all said structural steel and iron Seventy-seven Dollars (\$77.00) per ton upon such deliveries.

III.

That at all the times mentioned in this complaint, plaintiff owned and operated at Waukesha, Wisconsin, a modern, well-equipped factory designed for and used by plaintiff in the fabrication of structural steel and iron of the kind and character mentioned in said contract; that immediately after the execution of said contract plaintiff began carrying out its part of the same and made shop drawings, contracted for raw material out of which to manufacture such structural steel and iron, and fabricated thirty-nine and a quarter ($39\frac{1}{4}$) tons of such material in conformity with the plans and specifications, and forwarded the same to defendant by rail, f. o. b. cars, San Francisco, California, which defendant [41] accepted and applied upon said contract, and which

tonnage at Seventy-seven Dollars (\$77.00) per ton aggregated the sum of Three Thousand Twenty-one Dollars and Nine Cents (\$3,021.09), and that the defendant has wholly neglected and refused to pay the same, or any part thereof.

IV.

That plaintiff, in all things, kept and performed the stipulations by it to be performed by the terms of said contract until the defendant breached the said contract, as herein stated, and that plaintiff, at all times after said contract was entered into, stood ready, willing, able and anxious to carry out said contract and would have done so had it not been prevented by defendant from doing so.

V.

That on or about the — day of April, 1907, defendant ordered plaintiff to do no more work and ship no more material under said contract, as the erection of said building had been abandoned and defendant positively refused to accept any more of said fabricated material if shipped.

VI.

That defendant has not paid plaintiff anything upon said contract, nor damages for breaching the same, nor for the thirty-nine and a quarter ($39\frac{1}{4}$) tons of structural steel and iron delivered to the defendant and accepted by the defendant on said contract; that had the defendant not breached said contract, plaintiff could and would have carried out said contract and received from the defendant for the fifteen hundred (1500) tons of structural steel and iron aforesaid Seventy-seven Dollars (\$77.00)

per ton, or One Hundred and Fifteen Thousand Five Hundred Dollars (\$115,500); that at the date defendant breached said contract, as aforesaid, and ordered the plaintiff to cease work under it, the cost to plaintiff to have completed said contract in every particular, including the [42] market value of the raw material, labor and freights and the delivery to the defendant of the remaining One Thousand Four Hundred and Sixty and three-quarters ($1460\frac{3}{4}$) tons of said structural steel and iron, f. o. b. cars, San Francisco, California, would not have exceeded the sum of Eighty Thousand Three Hundred Thirty-five Dollars and Eighty-three Cents (\$80,335.83) and this last deducted from the contract price of One Hundred and Fifteen Thousand Five Hundred Dollars (\$115,500.00), would have left a profit accruing to plaintiff of Thirty-five Thousand One Hundred and Sixty-four Dollars and Seventeen Cents (\$35,164.17); that the items making up said Eighty Thousand Three Hundred Thirty-five Dollars and Eighty-three Cents (\$80,335.83), cost to have completed the said contract, consisted of the following items, to wit:

To cost for drawing labor in drawing-room.....	\$ 680.72
To cost of shop labor in the factory.....	6871.36
To freights for carrying $1460\frac{3}{4}$ tons of structural steel and iron from Waukesha, Wisconsin to San Francisco, California.....	21911.25
To cost of rolled material not fabricated, delivered at the factory at Waukesha,	

Wis., in a quantity sufficient to fulfill
the contract—122 Tons on hand, bal-
ance $1338\frac{3}{4}$ Tons at \$38.00 per ton. . . .50872.50

Total. \$80335.83

That said sum of Thirty-five Thousand One Hundred Sixty-four Dollars and Seventeen Cents (\$35,164.17) includes the Three Thousand Twenty-one Dollars and Nine Cents (\$3,021.09) for the fabricated material above specified, which was delivered by plaintiff to the defendant and not paid for by the latter.

VII.

That plaintiff has been injured and has suffered damages by reason of said breach of said contract by the defendant in the sum of Thirty-five Thousand One Hundred Sixty-four Dollars and Seventeen Cents (\$35,164.17), in the manner as aforesaid, and that since said contract was breached by said defendant, as aforesaid, and [43] before this suit was instituted, plaintiff demanded payment of said damages, but defendant has refused to pay the same, and never has paid the whole or any part thereof.

WHEREFORE, plaintiff prays judgment for the sum of Thirty-five Thousand One Hundred Sixty-four Dollars and Seventeen Cents, together with interest and costs of suit.

KEOGH and OLDS and
SENECA N. TAYLOR,
Attorneys for Plaintiff.

W. H. MORRISSEY,
Of Counsel.

State of Wisconsin,
County of Waukesha,—ss.

S. B. Harding, being duly sworn, says: That he is the President of the Modern Steel Structural Company, the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters he believes it to be true.

S. B. HARDING.

Subscribed and sworn to before me this 28th day of February, 1910.

[Seal]

GEO. F. HAWES,

Notary Public.

My commission expires May 22d, 1910. [44]

Received due service of within Second Amended Complaint and receipt of the sum of *fifty* (\$50), payment of which was a condition precedent to the filing of said complaint, admitted this twentieth (20th) day of June, 1911.

LENT & HUMPHREY,

Attorneys for Plaintiff.

[Endorsed]: Filed Jun. 22, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.
[45]

In the Circuit Court of the United States, Ninth District, Northern District of California.

MODERN STEEL STRUCTURAL COMPANY, a
Corporation,

Plaintiff,

vs.

AMERICAN-PACIFIC CONSTRUCTION COMPANY, a Corporation,

Defendant.

**Demurrer of Defendant to Second Amended
Complaint.**

Defendant above named, demurring to the second amended complaint of plaintiff, as grounds of demurrer assigns:

I.

That said second amended complaint does not state facts sufficient to constitute a cause of action against this defendant.

II.

Said second amended complaint is uncertain in each, every and all of the following particulars:

(a) It does not appear nor can it be ascertained from said second amended complaint what were the terms of the contract referred to in paragraph One of said complaint.

(b) It does not appear nor can it be ascertained from said second amended complaint what were the plans and specifications referred to in said paragraph One of said complaint.

(c) It does not appear nor can it be ascertained

from said second amended complaint whether or not it is claimed that the plaintiff and defendant made a contract of sale on the 19th day of January, 1907.

(d) It does not appear nor can it be ascertained from [46] said second amended complaint whether or not the structural steel alleged in the complaint to have been sold to the defendant on the 19th day of January, 1907, was in being or in the possession of said plaintiff, or whether or not the plaintiff had title to said steel on that day, or whether or not it could have completed said sale.

(e) It does not appear nor can it be ascertained from said second amended complaint what were the plans or specifications for the building referred to in paragraph II of said complaint.

(f) It does not appear nor can it be ascertained from said second amended complaint whether or not the alleged contract for the alleged sale of the said fifteen hundred tons of structural steel was in writing.

(g) It does not appear nor can it be ascertained from said second amended complaint when the said defendant was to pay for the said steel.

(h) It does not appear nor can it be ascertained from said second amended complaint when or how defendant breached the said contract referred to in said complaint.

(i) It does not appear nor can it be ascertained from said second amended complaint how the plaintiff was damaged by the alleged breach of said contract by the said defendant.

(j) It does not appear nor can it be ascertained

from said second amended complaint what, at the time it was alleged that defendant breached said contract, were the market value of the raw material, or the labor or the freight referred to in paragraph VI of said complaint.

(k) It does not appear nor can it be ascertained from said second amended complaint what was the market value of the material on the day that it is alleged said defendant breach said contract. [47]

(l) It does not appear nor can it be ascertained from said second amended complaint what was the freight from Waukesha, Wisconsin, to San Francisco, California, or of what the alleged shop drawings or shop labor consisted.

(m) It does not appear nor can it be ascertained from said second amended complaint whether or not the said plaintiff disposed of the 122 tons of rolled, but not fabricated, materials delivered at the factory at Waukesha, Wisconsin, and referred to in paragraph VI of said complaint, nor does it appear whether or not the same were disposed of at a profit.

(n) It does not appear nor can it be ascertained from said second amended complaint how or in what manner the said plaintiff has been injured or damaged by reason of the alleged breach of said contract by the said defendant in the sum of \$35,164.17, or in any sum whatsoever.

III.

Said second amended complaint is ambiguous in each, every and all of the particulars mentioned in the foregoing paragraph.

IV.

Said second amended complaint is unintelligible

in each, every and all of the particulars mentioned in paragraph II of this demurrer.

V.

That several causes of action have been improperly united in the said complaint in this:

There is a cause of action for alleged damages for breach of contract united with a cause of action for the recovery of the purchase price of steel alleged to have been sold and delivered to said defendant.

VI.

That several causes of action have not been separately stated in this:

That a cause of action for alleged breach of contract is [48] included in the same cause of action wherein it is sought to recover the purchase price of goods sold and delivered.

WHEREFORE, said defendant prays to be hence dismissed with its costs.

LENT & HUMPHREY,

Attorneys for Defendant.

Due service and receipt of a copy of the within Demurrer is hereby admitted this 13th day of September, 1911.

Attorneys for Plaintiff.

[Endorsed]: Filed Sep. 13, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.
[49]

At a stated term, to wit, the March term, A. D. 1912, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 13th day of May, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 14,716.

MODERN STEEL STRUCTURAL CO.

vs.

AMERICAN-PACIFIC CONSTRUCTION CO.

Order Overruling Defendant's Demurrer to Second Amended Complaint.

Defendant's demurrer to the second amended complaint, heretofore heard and submitted, being now fully considered and the Court having rendered its oral opinion, it was, in accordance therewith, ordered that said demurrer be and the same is hereby overruled. [50]

In the District Court of the United States, Northern District of California, Second Division.

Formerly in the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

MODERN STEEL STRUCTURAL COMPANY, a Corporation,

Plaintiff,

vs.

AMERICAN-PACIFIC CONSTRUCTION COM-
PANY, a Corporation,

Defendant.

Answer to Second Amended Complaint.

Defendant above named answering the so-called second amended complaint of plaintiff on file herein denies and avers as follows:

I.

Defendant avers it has no information or belief upon the subject sufficient to enable it to answer part of the allegation in the opening part of said second amended complaint and placing its denial on that ground denies that the plaintiff above-named is, or was at all the times herein or in said second amended complaint mentioned, or now is, a corporation organized or existing under or by virtue of the laws of the State of Wisconsin, or of any other State, or is a resident or citizen of the State of Wisconsin.

II.

Denies that on or about the 19th day of January, 1907, or on or about any other date, plaintiff and defendant, or plaintiff or defendant, made or entered into any contract; denies that plaintiff and defendant, or plaintiff or defendant, entered into a contract in substance as, or in any particulars as, or at [51] all as, set forth in paragraph I of plaintiff's second amended complaint.

Denies that on or about the 19th day of January, 1907, or at any other time, plaintiff and defendant, or plaintiff or defendant, entered into a contract by the terms of which or by any term of which, plaintiff agreed with the defendant to furnish material for,

or to fabricate all, or any structural steel and iron or either, required by the or any plans and specifications, or either, as the same then or ever, indicated for the new building to be erected by the defendant for the Richlieu Realty Syndicate. Denies that defendant erected or was to erect or that there was to be erected by it a new building for the Richlieu Realty Syndicate either at the southeast corner of Geary Street and Van Ness Avenue in the City and County of San Francisco, or elsewhere. Denies that said plaintiff agreed to deliver said or any material when so fabricated, or at any time to defendant f. o. b. cars San Francisco, California, at an agreed or other or any price of seventy-seven (77) dollars per ton; denies that the quantity of said structural steel and iron or either required for said or any building about to be erected or which plaintiff sold to the defendant for future delivery, or otherwise, was estimated at fifteen hundred (1500) tons or at any amount whatsoever; denies that plaintiff sold or agreed to sell to the defendant any structural or other steel and iron, or either, for future delivery, or otherwise; denies that by said alleged contract or any contract plaintiff agreed to deliver all or any of such or any material to defendant before September 1, 1907, or any other time.

III.

Denies that by the terms of said or any contract, defendant purchased from plaintiff for future delivery, or at all, or agreed to accept from plaintiff the, or any quantity, of structural or other [52] steel indicated or called for by the plans and specifications,

or by the plans or specifications for the building referred to in said second amended complaint, or by any plans and specifications, or plans or specifications; denies that any quantity was mutually or otherwise agreed between plaintiff and defendant, or that the quantity mutually or otherwise agreed between plaintiff and defendant was about fifteen hundred (1500) tons, or any tons or amount whatsoever; denies that said defendant at said time was under contract with the owners of said new building for the erection thereof; denies that defendant agreed to accept from plaintiff or pay plaintiff for all said structural steel and iron, or either thereof, seventy-seven (77) dollars, or any other price per ton upon such deliveries or at all.

IV.

Defendant has no information or belief upon the subject sufficient to enable it to answer the allegations in plaintiff's complaint about plaintiff's ownership and operation of a plant at Waukesha, Wisconsin, and placing its denial on that ground denies that plaintiff owned or operated at Waukesha, Wisconsin, or elsewhere, a modern or well-equipped, or any factory designed for or used by plaintiff in the fabrication of structural or other steel or iron, of the kind or character mentioned in said alleged contract, or any contract; denies that immediately or at all after the execution of said or any contract plaintiff began carrying out or carried out its or any of its part of the same or of any contract, or made shop or any drawings, or contracted for raw or other material out of which to manufacture such structural or other

steel or iron or anything; denies plaintiff fabricated thirty-nine and one-quarter ($39\frac{1}{4}$) tons of such or any material in conformity with the said plans and specifications or either or otherwise; denies plaintiff forwarded the same to defendant by rail f. o. b. cars San Francisco, California, or otherwise; [53] denies defendant accepted or applied upon said or any contract, or otherwise, said thirty-nine and one-quarter ($39\frac{1}{4}$) tons or any of such, or any material; denies that said or any tonnage accepted or applied by this defendant or forwarded to this defendant aggregated three thousand twenty-one dollars and nine cents (\$3,021.09); denies that said or any tonnage was forwarded to, or accepted or applied upon said or any contract or otherwise, by this defendant.

V.

Denies that plaintiff in all or any things kept or performed the stipulations or any of the stipulations by it to be performed by the terms of said contract, or otherwise; denies that plaintiff in all or any things kept or performed the stipulations or any of the stipulations by it to be performed by the terms of said contract or otherwise, until the defendant breached the said contract as herein, or elsewhere stated; denies that this defendant ever breached said or any contract; denies that said plaintiff at all times, or at any time before or after said contract was entered into, stood ready or was ready, willing, able or anxious to carry out said or any contract or would have done so had it not been prevented by defendant from doing so; denies that plaintiff was prevented by defendant from

carrying out said or any contract; denies that plaintiff was ready, able, willing or anxious to carry out said alleged or any contract.

VI.

Denies that at any time defendant ordered plaintiff to do no more work or ship no more material under said or any contract for the reason that the erection of said building had been abandoned or for any reason; denies defendant positively, or at all, refused to accept any or any more or any of said or any fabricated or other material if shipped, or otherwise. [54]

VII.

Denies that there is or ever was any contract upon or by which defendant was to pay plaintiff anything; denies defendant ever breached said or any contract; denies plaintiff was damaged by any breach of said or of any alleged contract; denies plaintiff ever delivered, or defendant ever accepted said thirty-nine and one-quarter ($39\frac{1}{4}$) tons or any amount of structural steel or iron on said contract, or otherwise; denies that defendant breached said or any contract; denies that had said alleged contract not been breached, or had not the alleged breach occurred, plaintiff could or would have carried out said or any contract or received from defendant for fifteen hundred (1500) tons of structural steel or iron, seventy-seven (77) dollars, or any sum per ton, or one hundred and fifteen thousand five hundred (115,500) dollars, or any other amount; denies that plaintiff could or would have delivered said fifteen hundred (1500) tons, or any amount whatsoever.

Denies defendant breached said contract or ordered plaintiff to cease work under it; denies that at the date it is alleged plaintiff breached said alleged contract, or ordered plaintiff to cease work under it, or at any other time, the cost to plaintiff to have completed in every or any particular either including or excluding the value of the raw material, labor and freights, or any, and the delivery to the defendant of the alleged remaining one thousand four hundred and sixty and three-quarter ($1460 \frac{3}{4}$) tons of said alleged structural steel and iron f. o. b. cars San Francisco, California, would not have exceeded the sum of eighty thousand three hundred thirty-five and eighty-three cents (\$80,335.83); or would not have exceeded the sum of \$84,971.83; denies that there was a contract price or that the contract price was or is one hundred and fifteen thousand five hundred dollars (\$115,500); [55] denies that in any circumstances or under any conditions, plaintiff under or by the performance of said contract would have made, or there would have been a profit of thirty-five thousand one hundred and sixty-four and seventeen cents (\$35,164.17), but, on the contrary, defendant avers that if plaintiff had fulfilled and carried out said alleged contract, it would have lost a large sum of money, the exact amount of which defendant cannot at this time determine.

Denies that the items of alleged cost set forth in paragraph VI of said alleged second amended complaint are the only items of cost that plaintiff would have incurred or been under in the performance of said contract; denies that any of the said items cor-

rectly sets forth or states the correct cost of the particular amount of said work it is intended to represent, and in this behalf defendant avers that said items are set forth as being correct for the purpose of this case only. Denies that said sum of three thousand twenty-one and nine cents (\$3,021.09) represents or is the value of any steel delivered to or accepted by defendant or not paid for by defendant.

VIII.

Denies that plaintiff has been injured or has suffered any damage by reason of the alleged breach of said alleged contract or any breach of any contract whatsoever; or has been injured or has suffered damage by reason of said alleged breach of said alleged contract or of any breach of any contract in the sum of thirty-five thousand one hundred sixty-four dollars and seventeen cents (\$35,164.17), or in the sum of thirty thousand five hundred twenty-eight and seventeen cents (\$30,528.17), or in any sum whatsoever, either in the manner set forth in said second amended complaint or in any manner whatsoever or at all.

Denies that since said or any contract was breached by said defendant or anyone else as alleged in said second amended complaint, [56] or otherwise, or before this suit was instituted, plaintiff demanded the payment of said or any damages. Denies the said plaintiff has ever suffered said or any damage; denies that said defendant ever breached said or any contract.

And for a further and separate answer and defense this defendant avers that the alleged cause of action

is barred by the provisions of subdivisions one (1) of section 339 of the Code of Civil Procedure of the State of California.

And for a further, separate and second answer and defense, this defendant avers that the alleged cause of action is barred by the provisions of subdivision one (1) of section 337 of the Code of Civil Procedure of the State of California.

WHEREFORE said defendant prays that plaintiff take nothing by its said action and that defendant have judgment for its costs herein incurred.

LENT & HUMPHREY,

Attorneys for said Defendant. [57]

It is hereby stipulated and agreed by and between the parties hereto that the above and foregoing unverified Answer of defendant, American-Pacific Construction Company, a corporation, may be filed herein tentatively with leave to verify same before the 1st day of August, 1912, and if not so verified, that such Answer shall be stricken from the files of the case on plaintiff's motion.

WRIGHT & WRIGHT & STETSON,

Attorneys for Plaintiff.

LENT & HUMPHREY,

Attys. for Defendant.

Service admitted and copy of within Answer received this 2d day of July, A. D. 1912, subject to stipulation attached thereto.

WRIGHT & WRIGHT & STETSON,

Attys. for Plaintiff.

[Endorsed]: Filed Jul. 3, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [58]

*In the District Court of the United States, Northern
District of California, Second Division.*

*Formerly in the Circuit Court of the United States,
Ninth Judicial Circuit, Northern District of
California.*

MODERN STEEL STRUCTURAL COMPANY,
a Corporation,

Plaintiff,

vs.

AMERICAN-PACIFIC CONSTRUCTION COM-
PANY, a Corporation,

Defendant.

Amended Answer to Second Amended Complaint.

Defendant above named answering the so-called second amended complaint of plaintiff on file herein, by this its amended answer, denies and avers as follows:

I.

Defendant avers it has no information or belief upon the subject sufficient to enable it to answer part of the allegation in the opening part of said second amended complaint, and placing its denial on that ground denies that the plaintiff above named is, or was at all the times herein or in said second amended complaint mentioned, or now is, a corporation organized or existing under or by virtue of the laws of the State of Wisconsin, or of any other State, or is a resident or citizen of the State of Wisconsin.

II.

Denies that on or about the 19th day of January,

1907, or on or about any other date, plaintiff and defendant, or plaintiff or defendant, made or entered into any contract; denies that plaintiff and defendant or plaintiff or defendant entered into a contract [59] in substance as, or in any particular as, or at all as, set forth in paragraph I of plaintiff's second amended complaint.

Denies that on or about the 19th day of January, 1907, or at any other time, plaintiff and defendant, or plaintiff or defendant, entered into a contract by the terms of which or by any term of which, plaintiff agreed with the defendant to furnish material for, or to fabricate all or any structural steel and iron, or either, required by the, or any, plans and specifications, or either, as the same then or ever, indicated for the new building to be erected by the defendant for the Richlieu Realty Syndicate. Denies that defendant erected, or was to erect, or that there was to be erected by it a new building for the Richlieu Realty Syndicate either at the southeast corner of Geary Street and Van Ness Avenue in the city and county of San Francisco, or elsewhere. Denies that said plaintiff agreed to deliver said or any material when so fabricated, or at any time, to defendant f. o. b. cars San Francisco, California, at an agreed or other or any price of seventy-seven dollars per ton; denies that the quantity of said structural steel and iron or either required for said, or any, building, about to be erected or which plaintiff sold to the defendant for future delivery, or otherwise, was estimated at fifteen hundred (1500) tons, or at any amount whatsoever; denies that plain-

tiff sold or agreed to sell to the defendant any structural or other steel and iron, or either, for future delivery or otherwise; denies that by said alleged contract or any contract plaintiff agreed to deliver all or any of such, or any, material to defendant before September 1, 1907, or any other time.

III.

Denies that by the terms of said or any contract, defendant purchased from plaintiff for future delivery, or at all, or agreed to accept from plaintiff the or any quantity of structural or other steel indicated or called for by the plans and specifications, [60] or by the plans or specifications for the building referred to in said second amended complaint, or by any plans and specifications, or plans or specifications; denies that any quantity was mutually or otherwise agreed between plaintiff and defendant, or that the quantity mutually or otherwise agreed between plaintiff and defendant was about fifteen hundred (1500) tons, or any tons or amount whatsoever; denies that said defendant at said time was under contract with the owners of said new building for the erection thereof; denies that defendant agreed to accept from plaintiff or pay plaintiff for all said structural steel and iron, or either thereof, seventy-seven (77) dollars, or any other price per ton upon such deliveries or at all.

IV.

Defendant has no information or belief upon the subject sufficient to enable it to answer the allegations in plaintiff's complaint about plaintiff's ownership and operation of a plant at Waukesha,

Wisconsin, and placing its denial on that ground, denies that plaintiff owned or operated at Waukesha, Wisconsin, or elsewhere, a modern or well equipped or any factory designed for or used by plaintiff in the fabrication of structural or other steel or iron, of the kind or character mentioned in said alleged contract, or any contract; denies that immediately or at all after the execution of said or any contract plaintiff began carrying out or carried out its or any of its part of the same or of any contract, or made shop or any drawings or contracted for raw or other material out of which to manufacture such structural or other steel or iron or anything; denies plaintiff fabricated thirty-nine and one-quarter ($39\frac{1}{4}$) tons of such or any material in conformity with the said plans and specification or either or otherwise; denies plaintiff forwarded the same to defendant by rail f. o. b. cars San Francisco, California, or otherwise; denies defendant accepted or applied upon said or any contract, [61] or otherwise, said thirty-nine and one-quarter ($39\frac{1}{4}$) tons or any of such, or any material; denies that said or any tonnage accepted or applied by this defendant or forwarded to this defendant aggregated three thousand twenty-one dollars and nine cents (\$3,021.-09); denies that said or any tonnage was forwarded to, or accepted or applied upon said or any contract or otherwise, by this defendant.

V.

Denies that plaintiff, in all or any things, kept or performed the stipulations or any of the stipulations by it to be performed by the terms of said

contract, or otherwise: denies that plaintiff in all or any things kept or performed the stipulations or any of the stipulations by it to be performed by the terms of said contract or otherwise, until the defendant breached the said contract as herein, or elsewhere stated; denies that this defendant ever breached said or any contract; denies that said plaintiff at all times, or at any time before or after said contract was entered into, stood ready or was ready, willing, able or anxious to carry out said or any contract or would have done so had it not been prevented by defendant from doing so; denies that plaintiff was prevented by defendant from carrying out said or any contract; denies that plaintiff was ready, able, willing or anxious to carry out said alleged or any contract.

VI.

Denies that at any time defendant ordered plaintiff to do no more work or ship no more material under said or any contract for the reason that the erection of said building had been abandoned or for any reason; denies defendant positively, or at all, refused to accept any or any more or any of said or any fabricated or other material if shipped, or otherwise. [62]

VII.

Denies that there is or ever was any contract upon or by which defendant was to pay plaintiff anything; denies defendant ever breached said or any contract; denies plaintiff was damaged by any breach of said or of any alleged contract; denies plaintiff ever delivered, or defendant ever accepted said

thirty-nine and one-quarter ($39\frac{1}{4}$) tons or any amount of structural steel or iron on said contract, or otherwise; denies that defendant breached said or any contract; denies that had said alleged contract not been breached, or had not the alleged breach occurred, plaintiff could or would have carried out said or any contract or received from defendant for fifteen hundred (1500) tons of structural steel or iron, seventy-seven (77) dollars, or any sum per ton, or one hundred and fifteen thousand five hundred (115,000) dollars, or any other amount; denies that plaintiff could or would have delivered said fifteen hundred (1500) tons, or any amount whatsoever.

Denies defendant breached said contract or ordered plaintiff to cease work under it; denies that at the date it is alleged plaintiff breached said alleged contract, or ordered plaintiff to cease work under it, or at any other time, the cost to plaintiff to have completed in every or any particular either including or excluding the value of the raw material, labor and freights, or any, and the delivery to the defendant of the alleged remaining one thousand four hundred and sixty and three-quarters ($1460\frac{3}{4}$) tons of said alleged structural steel and iron f. o. b. cars San Francisco, California, would not have exceeded the sum of eighty thousand three hundred thirty-five and eighty-three cents (\$80,335.83), or would not have exceeded the sum of \$84,971.83; denies that there was a contract price or that the contract price was or is one hundred and fifteen thousand five hundred dollars (\$115,500); denies that in any circumstances or [63] under any con-

ditions, plaintiff under or by the performance of said contract would have made, or there would have been a profit of thirty-five thousand one hundred and sixty-four and seventeen cents (\$35,164.17), but, on the *contract*, defendant avers that if plaintiff had fulfilled and carried out said alleged contract, it would have lost a large sum of money, the exact amount of which defendant cannot at this time determine.

Denies that the items of alleged cost set forth in paragraph VI of said alleged second amended complaint are the only items of cost that plaintiff would have incurred or been under in the performance of said contract; denies that any of the said items correctly sets forth or states the correct cost of the particular amount of said work it is intended to represent, and in this behalf defendant avers that said items are set forth as being correct for the purpose of this case only; denies that said sum of three thousand *twenty-one and nine cents* (\$3,021.09) represents or is the value of any steel delivered to or accepted by defendant, or not paid for by defendant.

VIII.

Denies that plaintiff has been injured or has suffered any damage by reason of the alleged breach of said alleged contract or any breach of any contract whatsoever; or has been injured or has suffered damage by reason of said alleged breach of said alleged contract or of any breach of any contract in the sum of thirty-five thousand one hundred and sixty-four dollars and seventeen cents (\$35,164.17), or in the sum of thirty thousand five hundred *twenty-eight*

and seventeen cents (\$30,528.17) or in any sum whatsoever, either in the manner set forth in said amended complaint or in any manner whatsoever, or at all.

Denies that since said or any contract was breached by said defendant or anyone else as alleged in said second amended complaint, [64] or otherwise, or before this suit was instituted, plaintiff demanded the payment of said or any damages; denies the said plaintiff has ever suffered said or any damage; denies that said defenant ever breached said or any contract.

And for a further and separate answer and defense this defendant avers that the alleged cause of action is barred by the provisions of subdivision one (1) of section 339 of the Code of Civil Procedure of the State of California.

And for a further, separate and second answer and defense, this defendant avers that the alleged cause of action is barred by the provisions of subdivision one (1) of section 337 of the Code of Civil Procedure of the State of California.

WHEREFORE, said defendant prays that plaintiff take nothing by its said action and that defendant have judgment for its costs herein incurred.

LENT & HUMPHREY,

Attorneys for said Defendant. [65]

State of California,

City and County of San Francisco,—ss.

W. G. Hitchcock, being first duly sworn, deposes and says: That he is the Secretary of the American-Pacific Construction Company, a corporation, the

defendant named in the foregoing amended answer, and as such officer he makes this affidavit on behalf of said corporation; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief and as to those matters that he believes it to be true.

On or about the first day of December, 1910, an order was made by the Governor of the State of California declaring the Charter of said corporation forfeited, and since said date the said corporation has transacted no business. On said day affiant was Secretary and a Director of said corporation; that the facts set forth in said answer, except those stated on information and belief, are within the knowledge of affiant.

WM. G. HITCHCOCK.

Subscribed and sworn to before me this 8th day
of August, 1912.

[Seal] GEORGE D. PERRY,
Court Commissioner of the City and County of San
Francisco, State of California.

Due service and receipt of a copy of the within Amended Demurrer is hereby admitted this 8th day of August, 1912.

WRIGHT & WRIGHT & STETSON,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 9, 1912. Jas. P. Brown,
Clerk. By W. B. Maling, Deputy Clerk. [66]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 14,716.

MODERN STEEL STRUCTURAL COMPANY, a
Corporation,

Plaintiff,

vs.

AMERICAN-PACIFIC CONSTRUCTION COM-
PANY, a Corporation,

Defendant.

Verdict.

We, the jury, find in favor of the plaintiff and as-
sess the damages against the defendant in the sum
of Seventeen Thousand Three Hundred and Seventy-
two (\$17,372) Dollars.

D. DUNCAN,
Foreman.

[Endorsed]: Filed Sept. 18, 1912. Jas. P. Brown,
Clerk. By W. B. Maling, Deputy Clerk. [67]

*In the District Court of the United States, for the
Northern District of California, Second Divi-
sion.*

No. 14,716.

MODERN STEEL STRUCTURAL COMPANY, a
Corporation,

Plaintiff,

vs.

AMERICAN-PACIFIC CONSTRUCTION COM-
PANY, a Corporation,

Defendant.

Judgment.

This cause having come on regularly for trial on the 12th day of September, 1912, being a day in the July, 1912, Term of said Court, before the Court and a jury of twelve men duly impaneled and sworn to try the issue joined herein; Seneca N. Taylor and Wright and Wright, Esqrs., appearing as attorneys for the plaintiff, and Wm. F. Humphrey, Esq., appearing as attorney for the defendant; and the trial having been proceeded with on the 13th, 17th and 18th days of September, in said year and term, and evidence, oral and documentary, upon behalf of the respective parties having been introduced and closed and the cause after arguments of the attorneys and the instructions of the Court having been submitted to the jury and the jury having subsequently rendered the following verdict, which was ordered recorded, namely: "We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Seventeen Thousand Three Hundred and Seventy-two (\$17,372) dollars. D. Duncan, Foreman," and the Court having ordered that judgment be entered in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Modern Steel Structural Company, a corporation, plaintiff, do have and recover of and from American-Pacific Construction Company, a corporation, defendant, the sum of Seventeen thousand three hundred seventy-two and no/100 (\$17,372.00) dollars, together with its [68] costs in this behalf

expended taxed at \$228.70.

Judgment entered September 18th, 1912.

JAS. P. BROWN,
Clerk.

By W. B. Maling,
Deputy Clerk.

A true copy, Attest:

[Seal] JAS. P. BROWN,
Clerk.

By W. B. Maling,
Deputy Clerk.

[Endorsed]: Filed Sept. 18, 1912. Jas. P. Brown,
Clerk. By W. B. Maling, Deputy Clerk. [69]

*In the District Court of the United States for the
Northern District of California.*

No. 14,716.

MODERN STEEL STRUCTURAL CO.

vs.

AMERICAN-PACIFIC CONSTRUCTION CO.

Certificate to Judgment-roll.

I, Jas. P. Brown, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court
this 18th day of September, 1912.

[Seal]

JAS. P. BROWN,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

[Endorsed]: Filed September 18th, 1912. Jas. P.
Brown, Clerk. By J. A. Schaertzer, Deputy Clerk.
[70]

*In the District Court of the United States, Northern
District of California, Second Division.*

*Formerly in the Circuit Court of the United States,
Ninth Judicial Circuit, Northern District of
California.*

No. 14,716.

MODERN STEEL STRUCTURAL COMPANY, a
Corporation,

Plaintiff,

vs.

AMERICAN-PACIFIC CONSTRUCTION COM-
PANY, a Corporation,

Defendant.

Defendant's Bill of Exceptions.

BE IT REMEMBERED that on Thursday, the
12th day of September, 1912, the above-entitled ac-
tion came on regularly for trial before the above-
entitled court and a jury, the Honorable WM. C.
VAN FLEET, presiding. The plaintiff herein being
represented by Seneca E. Taylor, Esq., and Messrs.
Wright & Wright & Stetson, and the defendant be-

ing represented by Messrs. Lent & Humphrey. Thereupon the following proceedings were had and taken:

Seneca E. Taylor, Esq., as counsel for the plaintiff, made the opening statement.

Deposition of Samuel B. Harding, for Plaintiff.

Thereupon on behalf of plaintiff, there was read in evidence the deposition of SAMUEL B. HARDING, a witness produced on behalf of plaintiff, said deposition having been taken at the city of Waukesha, State of Wisconsin, before T. W. Parkinson, Esq., appointed as a Commissioner to take testimony in said cause.

Mr. Harding testified as follows:

My name is Samuel B. Harding; I am 43 years of age and reside at Waukesha, Wisconsin; I am President of the Modern Steel Structural Company, the plaintiff in this action, and have [71] been its President and General Manager for 11 years. It is engaged in the fabrication, manufacture and erection of steel structures of all kinds, and receives steel from rolling-mills and then fabricates it into structural steel for buildings; it has been in that line of business for 11 years. Its plant is located at Waukesha, Wisconsin; the main building of the plant is about 125 by 600 feet; the other buildings consist of a machine-shop, 60 by 160, and a foundry building 50 by 240 feet. The capacity of the plant in full operation is 100 tons per day. In other words, it could take 100 tons of steel or beams, girders, etc., such as come from the rolling mill and fabricate them into structural steel at the rate of 100 tons per day.

(Deposition of Samuel B. Harding.)

In 1906 or 1907, its capacity was but 80 tons per day, which capacity it had in the month of January, 1907, and has had that or more ever since.

(It was here admitted that the plaintiff at all the times mentioned in its second amended complaint was, and still is, a corporation organized under the laws of the State of Wisconsin, and a resident and citizen of the State of Wisconsin, and that the defendant was and still is a corporation organized under the laws of the State of California, with its principal office, residence and domicile in the City of San Francisco, and that the amount claimed by the plaintiff, and resisted by the defendant, exceeds the sum of Two Thousand Dollars.)

Q. Mr. Harding, state whether or not the Modern Structural Company had a written contract with the American-Pacific Construction Company, defendant, with reference to furnishing a quantity of structural steel for the building known as the Columbia Theatre of San Francisco.

Mr. HUMPHREY.—The question is objected to as leading and suggestive; not the best evidence and calling for a conclusion of the witness as to whether or not there is a written or any contract. [72]

The objection was overruled and exception taken by the defendant, which exception defendant hereby designates as "Exception No. 1."

(Exception No. 1.)

A. I did.

I have in my possession a copy of that contract as executed by defendant, but the original is not in my possession.

(Deposition of Samuel B. Harding.)

Q. When did you last see the written contract executed by the defendant, with reference to structural steel for the Columbia Theatre in San Francisco?

The question is objected to on the ground that it is not the best evidence and is leading and suggestive, calls for the conclusion of the witness as to whether or not there is a written or any contract.

A. Late in the winter of 1907. I last saw it around the drafting-room of the plaintiff's office. It had been in the plaintiff's possession at that time from four to six weeks. As President of the Company I have made or caused to be made a diligent search for the contract.

"I made a personal search through our regular file where we keep under lock and key all contracts of this nature where they are arranged in numerical order and according to dates. The contract at the time I last saw it we had out of this file for examination, and it was then left in the hands of our draughting department. Several persons as I remember it used it at that time and that was the last I saw of it. Evidently it was never returned to the file or returned to me so I could lock it up. I have had our secretary and our cost-accountant make a thorough search for it through all the files about the office, but have not been able to find it."

At this point the defendant admitted that Thomas Vigus was the General Manager of the American-Pacific Construction [73] Company in December, 1906, and January, 1907, but did not admit that he had power to sign the contract referred to in plain-

(Deposition of Samuel B. Harding.)

tiff's second amended complaint.

Mr. WRIGHT.—(Reading:) “I note that there is attached to it what purports to be some typewritten matter, consisting of three pages. What did that matter relate to, so attached to the letter?

A. That is a carbon copy of the typewritten matter that was inserted in our regular form of proposal and contract, two copies of which were forwarded to the American-Pacific Construction Company for acceptance and the return of one copy for our files.”

Thereupon plaintiff offered and there was received in evidence and marked Plaintiff's Exhibit “A” a letter dated December 21, 1906, addressed to Mr. S. B. Harding, President of the Modern Steel Structural Company, Waukesha, Wisconsin, and signed by Thomas Vigus, General Manager of the American-Pacific Construction Co., which letter is in words and figures as follows, to wit:

[Plaintiff's Exhibit “A”—Letter Dated December 21, 1906, American-Pacific Construction Co. to S. B. Harding.]

“Dec. 21, 1906.

Mr. S. B. Harding, Pres.

Modern Steel Structural Co.,

Waukesha, Wis.,

Dear Sir:

The Richelieu Realty Co. interviewed me this morning in regard to contract, and I submitted to them contract that you and I discussed last evening. They have it now with their lawyer, and have practically closed with me. There is one or two little

clauses they will probably insert that means nothing.

These gentlemen have absolutely put me on my honor in regard to delivery, explaining that they are paying us more for the tonnage by \$2.25 per ton than any other Company, giving it to us, first, because we are a local Company, second, because all of their Board of Directors are personal friends of the officers of this Company. You see this places me in rather a delicate [74] position, and we want to do our utmost to make a quick delivery of something to start on. Smedberg, the Engineer, has just left the office, and told me to inform you that he will ship you tonight or in the morning, all of the drawings that you saw yesterday in his office.

I am making my contract with the Columbia Theatre people in triplicate, so will send you an exact copy, under their signature, of what we are doing.

They objected to the payment of cash against sight draft with B/L attached, but will pay 75% in cash on delivery of the steel at site of building, the other 25% they will hold until thirty-five days after completion of the erection of the steel. This will be perfectly satisfactory to us, as they are a heavy concern, and very responsible, and we did not want to act small with them in the way of payments.

I explained to you when in this City, that this contract means a good deal to us, and would put us to the front very rapidly if we can do any way near what we discussed, and what we have lead the Columbia people to believe. Mr. Smedberg we have well in line, and he will do about what we want in the matter.

STRUCTURAL SHOP HERE: In regard to this matter, I took it up with our Board of Directors to-day, they told me to go ahead on whatever basis I thought would be the advantage of this Company, and in this connection will ask you to immediately on your arrival in the east draft me a proposition giving me the proposition as follows:

A lump sum bid for the erection of the plant in this City and state about what time it will take for you to make delivery and put same in running order.

In doing this, remember speed is money. I would like, however, to have you state, if you can consistently do so, that you will take one-third interest providing you have not to put [75] up any cash, and that you will pay for your one-third interest out of the dividends of the Company. However, if you think you cannot consistently do this, try to make some amicable compromise between your original proposition and the one I submit.

In regard to getting men to take care of the work, I want to impress upon you the great importance of those men being very competent, as well as sober and industrious.

We anticipate that the amount of money first involved will be only a starter, and as we have sufficient more to enlarge it, there will be no question in my mind that you will be the first one to suggest it, with the business that is in sight in this city for the next few years.

A telegram came here this morning for you and I sent it to George and asked him to attend to it, as I was not familiar with the subject in hand.

Trusting that you had a pleasant trip home, and will have an enjoyable Christmas, we remain,

Yours truly,

AMERICAN-PACIFIC CONSTRUCTION
CO.

By THOMAS VIGUS,

General Manager."

Plaintiff then offered and read and had admitted in evidence and marked Plaintiff's Exhibit "B" a letter from Thomas Vigus, as General Manager of the American-Pacific Construction Company, to the Modern Steel Structural Company, dated December 22, 1906, which letter is in the words and figures as follows:

[Plaintiff's Exhibit "B"—Letter Dated December 22, 1906, American-Pacific Construction Co. to Modern Steel Structural Co.]

"Dec. 22, 1906.

The Modern Steel Structural Co.,
Waukesha, Wis.

Gentlemen:

We enclose you herewith copy of letter to the Richelieu Realty Syndicate of even date which will explain itself. [76]

Yours truly,

AMERICAN-PACIFIC CONSTRUCTION
CO.

By THOMAS VIGUS,

General Manager."

Thereupon plaintiff read, offered and had admitted in evidence and marked Plaintiff's Exhibit "C" a letter from the American-Pacific Construc-

tion Company to S. B. Harding, which letter is dated the 22d day of December, 1906, and is in the following words and figures:

[Plaintiff's Exhibit "C"—Letter Dated December 22, 1906, American-Pacific Construction Co. to S. B. Harding.]

"Dec. 22, 1906.

Mr. S. B. Harding,
Waukesha, Wis.,

Dear Sir:—

Referring to the enclosed letter, we have been authorized to go ahead with the work although contract is not signed. Should any technicality arise in the signing of the contract we will wire you to stop work and return blue-prints. If you do not get any wire to that effect proceed as if contract was signed and this Company will be responsible for the work.

Yours truly,

AMERICAN-PACIFIC CONSTRUCTION
CO.

By THOMAS VIGUS,
General Manager."

Thereupon plaintiff offered and had admitted in evidence and marked Plaintiff's Exhibit "D," a letter from the American-Pacific Construction Company to The Richelieu Realty Syndicate, which letter is dated December 22, 1906, and is in the words and figures as follows:

[Plaintiff's Exhibit "D"—Letter Dated December 22, 1906, American-Pacific Construction Co. to Richelieu Realty Syndicate.]

"Dec. 22, 1906.

The Richelieu Realty Syndicate,
San Francisco, Calif.,

Gentlemen:

We have to confirm our verbal contract made [77] with you of even date to furnish all the Structural Steel according to the specifications and plans submitted by your Engineer Jos. D. Smedberg, at the rate of Ninety-eight (\$98.50) Dollars and fifty cents per ton, erected at the building. This contract we understand was given in order to facilitate the delivery of material and should any technicality arise that would result in the contract not being signed, it is understood you are to pay this Company for any work that has been done in ordering or fabricating the steel from this date for your account.

Yours truly,

AMERICAN-PACIFIC CONSTRUCTION
CO.

By THOMAS VIGUS,
General Manager."

Thereupon plaintiff had admitted in evidence and marked Plaintiff's Exhibit "E" a letter from the American-Pacific Construction Co. to S. B. Harding, which letter was dated the 22 day of December, 1906, and is in the words and figures as follows:

[Plaintiff's Exhibit "E"—Letter Dated December 22, 1906, American-Pacific Construction Co. to S. B. Harding.]

“Dec. 22, 1906.

Mr. S. B. Harding, Pres.,
Modern Steel Structural Co.,
Waukesha, Wis.,

Dear Sir:

Columbia Theatre Building.

To day the Columbia Theatre people had me in their office at 1-30, telling me the contract was ours, to go ahead. I submitted them the contract planned out by you and I, with the exception of payments, which you will note on the enclosed copy, which I was willing to sign. They wanted to submit it to their attorney, and on account of my leaving for Los Angeles tonight to be with my family on Christmas, I have deferred the signing of the contract until I return next Thursday morning.

This was the arrangement at noon, since then I have received your telegram from Colfax, as per confirmation herewith. I [78] did not quite understand the last two words of your telegram. However, there are a number of things to be taken up before I sign the contract, and I do not propose to sign up until I hear from you. I will probably get George to come up with me from Los Angeles, and get the benefit of his experience in signing up this contract.

Mr. Smedberg the Engineer is now in my draughting department checking up some details in red pen-

cil that he says you can go ahead with. You will, however, know best when you receive them. They leave tonight by Wells-Fargo Express, as well as the blue prints signed by Smedberg the Engineer, and have the seal of the Richelieu Realty Syndicate on them. The Richelieu Realty Syndicate have also put their seal to each of the specifications, witnessed by Mr. Smedberg the Engineer, and myself as well as his signature personally as Engineer.

If you can make the shipment of a couple of carloads off of the details that he says he has ready for you to get up material on, please do so, as we certainly want to keep our word with the Company. If we have no hitch, however, in the signing of this contract in the next few days, and as we are going to make arrangements with you whenever you are ready to start our Structural Works, here, do you not think it would be well to put on our pay roll here immediately, a first class steel man that you spoke of. We do not mind the expense if you can spare him and send him out here. Then these matters that we are inexperienced in will be well taken care of. The question came up today of the weights of the steel, and I informed them that they were taken care of in the clause of our contract of "Carnegie's Hand Book."

I will get George to thoroughly post me on this in Los Angeles so I will be in position to get contract in the way you would want us to have it.

I will write you more fully on my return to the city [79] Wednesday or Thursday, and after I have gone over the matter with George.

Mr. Smedberg has dictated a long letter to you which he wants me to sign. I will go over it carefully and put it in tonight's mail.

Wishing you a Merry Christmas, we are,

Yours truly,

AMERICAN-PACIFIC CONSTRUCTION
CO.

By THOMAS VIGUS,
General Manager."

Thereupon plaintiff offered and had admitted in evidence and marked Plaintiff's Exhibit "F" a letter from the Modern Steel Structural Company to the American-Pacific Construction Company, dated December 27, 1906, which letter is in the words and figures as follows:

[Plaintiff's Exhibit "F"—Letter Dated December 27, 1906, Modern Steel Construction Co. to American-Pacific Construction Co.]

(LETTER-HEAD, MODERN STEEL STRUCTURAL CO.)

"Waukesha, Wis., Dec. 27, 1906.

American-Pacific Cons. Co.,

San Francisco, Cali.

Gentlemen:

APPROVAL OF PLANS.

We acknowledge receipt of your of Dec. 22nd enclosing specifications. We expect to be in receipt of the drawings mentioned today.

In answer to the last paragraph of your letter would say that your unfamiliarity with the work naturally leads you to ask such a question. You

understand that we will have to make detail drawings and have them approved before we can make any start. Then, the proposition that the writer outlined for your use will hold true and we will stick very closely to that and it will be entirely up to the engineer to get the drawings approved and you can always get under cover of that argument, if he is behind the customer's wishes with such approval. Most of the [80] difficulties in connection with all building construction work of this nature is to get the matter of the drawings thoroughly understood and definitely outlined. We then have a starting point.

Would call your attention to the fact that we have not yet received the Bullock-Jones plans, signed and approved by the architect. However, we are in receipt of your letter of Dec. 22nd stating that they are en route; attached to which letter is a copy of the architect's letter of Dec. 21st. We beg to notify you that this is not an approval, as provided in our agreement. However, we are accepting your letter of Dec. 22nd, and especially the foot note in free-hand, as a waiver of this formality, as no doubt, everything will be all right, but please take notice that we have no authority for proceeding with the work, strictly speaking, until the letter of our agreement is complied with. In this connection, we understand your western methods of doing business as compared with ours back here and can very well see how there will be no difficulty, yet would call your attention to the written understanding between

us with reference to this point.

Yours truly,

MODERN STEEL STRUCTURAL CO.

S. B. H.

By S. B. HARDING."

Thereupon plaintiff had admitted in evidence and marked Plaintiff's Exhibit "G" a letter from the Modern Steel Structural Company to the American-Pacific Construction Company, dated December 27, 1906, which letter is in the words and figures as follows:

[Plaintiff's Exhibit "G"—Letter Dated December 27, 1906, Modern Steel Structural Co. to American-Pacific Construction Co.]

(LETTER-HEAD, MODERN STEEL STRUCTURAL CO.)

"Waukesha, Wis., Dec. 27, 1906.

American-Pacific Cons. Co.,

San Francisco, Cali.

Gentlemen:—

On explanation of telegram sent you yesterday, which reads as [81] follows: "Our custom to insert weight by Western Weighing Ass'n. Just as independent as public scales." We beg to state that we have never sold any material on a basis of city scaled weights anywhere and do not think that it is a good time to begin. Our objection to so doing is the unreliability of such weights and the absence of any provision to have positive errors corrected. We therefore offered the suggestion that the Western Weighing Ass'n. weights govern. You understand that at all large plants the Ass'n has a representa-

tive, who weighs all carload shipments. One of their representatives is at our works all the time. He weighs all material going out and coming in. Therefore there is no dispute on the part of Ry. Cos. as to the weights of our shipments. They are never weighed in transit; the Ry. Co. accepting the Ass'n weights.

Now, aside from this, if you will read the specifications you will see that they provide for shop inspection. Shop inspectors usually verify the weights for the customer as they pass over the scales.

Our scales are correct; they are tested periodically by the W. W. Ass'n. and we have them tested, as well, for our own satisfaction. This is the independent method of weighing and is perfectly fair to all parties and is the only way we would care to sell the goods, aside from correct estimated weights, which is conceded to be the most practical plan, as the engineer can check the weight of every piece exactly. Either of these ways is satisfactory to us; preferably the latter.

Yours truly,

MODERN STEEL STRUCTURAL CO.

S. B. H. By S. B. HARDING." [82]

Plaintiff thereupon offered and had admitted in evidence and marked Plaintiff's Exhibit "H" a letter from the Modern Steel Structural Company to the American-Pacific Construction Company, dated December 31st, 1906, which is in the words and figures as follows:

[Plaintiff's Exhibit "H"—Letter Dated December 31, 1906, Modern Steel Structural Co. to American-Pacific Construction Co.]

(LETTER-HEAD MODERN STEEL STRUCTURAL CO.)

"Waukesha, Wis., Dec. 31, 1906.

Amer.-Pacific Cons. Co.,
San Francisco, Cali.

Gentlemen:—

We acknowledge receipt of your four favors of Dec. 22nd. We note by same our protection and yours in the event that the Realty Co. do not sign.

We note what you say in your third page letter pertaining to signing of contract for theatre bldg. We do not believe it will add anything to have George come up, as the writer was very careful in framing this contract for you and George will be unfamiliar with the details from the time the writer took it up with you, as we told him he had better drop it at that point.

We regret that you did not send the writer's pencil memo. of the contract that he advised you to enter into with the Realty Co. You will remember he asked you to forward it when you had taken a copy.

We notice, under "Delivery," you have permitted the words to come in "These same, however, to be subject to his revisions &c." This simply knocks the whole delivery feature in the head. In other words, when the engineer's name once goes on to the plans, that should settle it. Or else, if the engineer wants to make reversions, he should allow a corres-

ponding extension of time and compensation for the changes which are apt to be very [83] expensive privileges and amount to a considerable delay. We very well realize that you do not appreciate what this means, but we do. We have been up against it so many times.

Mr. Smedberg has not yet arrived. We expect him any moment now and this clause will have to come out, or be revised, that is dead sure. We would suggest then that you first see our form of contract, after we have talked with him, and then make your contract with the Realty Co. agree exactly therewith. You might as well put the pencil form of contract into the mail, so that we can have an exact copy of what the writer left with you. You may rest assured through all of this transaction that we will have your interest at heart, as we very well understand your position and your desire to make a record and we will not lose sight of it for a minute and if you do not hear from us, you need not think that we are asleep or going slowly, but you may understand that we are doing everything that we can to facilitate delivery of this material. You will have to put yourself in our hands to do the right thing by you and do not annoy yourself with a lot of correspondence and telegrams and likewise increase our work thereby. We know exactly what wants to be done and just how to do it. Leave that to us and it will be done the best we know how and as quickly as we know how.

We note what you say about sending engineer. Let us tell you that you will not learn anything from any engineer as a rule. You must get your help

from the combination of an engineer and a practical man, which the writer also suggested sending, and then combine their opinions and use your own best judgment. As soon as the engineer is away from this section 30 days, he is out of touch with the steel world and is not up to date, as he would be continuing on here. The idea that we mean to convey to you is this: that the engineer and the works manager and yourself in combination will work out a success, as the writer will supply you with the right men to do it, and not any one of you, until [84] some experience has been had, will know the correct thing to do at once, without the help of the other two. The engineer will help to a small degree and we are planning for a shift to help you out in that respect and to help you out as soon as possible on general principles.

You were correct when you stated that the weights were taken care of by Carnegie Hand Book and you could have added the rutable variations as noted in Manufacturer's Standard Specifications contained in same hand book.

If Mr. Smedberg intended to leave on Friday regardless it will not do much good. The writer agreed that our Company would stand his expenses to Waukesha rather than our sending a man there. This is O. K. but at this writing, we do not see why he should come just now. In about one week, we will wire him to come, so that he can approve the first set of drawings while here and give us sufficient data for a considerable portion of the bldg. if not all

of it, at that time. We think this is the wisest, all things considered.

We also acknowledge receipt of your letter of same date, evidently dictated by Mr. Smedberg. We have not yet found anything to prevent our going ahead without his help for a week or so and will wire for him when we are ready.

Yours truly,

MODERN STEEL STRUCTURAL CO.

S. B. H.

By S. B. HARDING."

(It was admitted by the parties that the person referred to in the letter as "George" was George Harding, a brother of the President of the plaintiff, and was located in Los Angeles at the time of the transaction referred to in Plaintiff's Second Amended Complaint.)

Thereupon plaintiff had admitted in evidence and marked [85] Plaintiff's Exhibit "I," a letter from the American-Pacific Construction Company to the Modern Steel Structural Company, which letter was dated January 4, 1907, and is in the words and figures as follows:

[Plaintiff's Exhibit "I"—Letter, Dated January 4, 1907, American-Pacific Construction Co. to Modern Steel Structural Co.]

“January 4, 1907.

Structural Steel Works.

Modern Steel Structural Co.,

Waukesha, Wisconsin.

Gentlemen:

Attention Mr. Harding:

I have to acknowledge receipt of your proposition, information, etc., for which we have to thank you.

At our regular meeting on Tuesday next we will go over matter in detail and you will hear us in regard to same during the coming week.

In one of your letters you wish to know of the financial condition of this firm and its responsibility. The writer gave you all the information when you were here—such as capitalization, etc. We are incorporated for \$3,000,000.00, \$180,000.00 of which is paid up. We have work on hand to the extent of about \$3,000,000 on a ten per cent basis and doing a very safe business. For the responsibility of the officers of the Company will refer you to Mr. Wm. Gregg, Jr., Crocker National Bank. You can also write to the usual mercantile channels—Dun or Bradstreets for our credit, etc. I may say to you personally that Mr. Meyerstein, the President, is a wealthy man; Mr. Drum, the Vice-president, a man of means, and they can command at almost any bank in this city a matter of \$300,000 or \$400,000 on their notes at any time.

If you should require any money on account from time to time, even before we receive ours, we will be very glad to help you all we can. [86]

If there is any further information I can give you on this subject, advise me and I will be very glad to take it up further with you.

Yours very truly,

AMERICAN-PACIFIC CONSTRUCTION
CO.

Per THOMAS VIGUS,
General Manager."

Thereupon plaintiff had admitted in evidence and marked Plaintiff's Exhibit "J" a letter from the Modern Steel Structural Company to the American-Pacific Construction Company, dated January 4th, 1907, and which is in the words and figures as follows:

**[Plaintiff's Exhibit "J"—Letter Dated January 4,
1907, Modern Steel Structural Co. to American-
Pacific Construction Co.]**

**(LETTER-HEAD, MODERN STEEL STRUC-
TURAL CO.)**

"Jan. 4th, 1907.

American-Pacific Cons. Co.,
San Francisco, Cali.

Gentlemen:

The other day, we suggested not sending our formal proposal until Mr. Smedberg arrived, but this is going to make the proposition too uncertain, we think; therefore, we are not waiting for the lead pencil copy to come in, which the writer left with you, but are sending herewith our formal proposition in duplicate, executed by ourselves, so, if you find same

satisfactory, it will only be necessary to return one copy accepted.

Now, in this connection, the writer has given this proposition and the probable future contingencies considerable thought and has prepared this proposition while his mind was fresh and believes that we have intelligently gone about it. So much so, that we think your contract with the Realty Co. should read in every respect the same, except wherein your relations with them will be different than our relations with you. But that portion referring to technicalities in the construction, plans or specifications should remain unchanged in your proposition to them, as we [87] have taken special care with this wording.

In the matter of delivery, there can be no argument whatever as to whose fault some future delay is attributable. We are far enough along into the detail drawings to see that our course was wise, which we suggested the other day, namely, that Mr. Smedberg come a little later, on request, when we have the drawings ready for his signature, as we find some little things that he has not taken care of and all questions referring to the first part can be taken care of at one time.

We recommend your getting your contract into shape on the basis of the enclosures at once, so that we may feel perfectly safe in our purchase of steel.

Advise when we may expect return of the papers, as we believe between you and us there will be no necessity for changes of any kind in the proposal, as it certainly corresponds with the spirit of our talk

(Deposition of Samuel B. Harding.)
on the subject all the way through.

Yours truly,

MODERN STEEL STRUCTURAL CO.

S. B. H.

By S. B. HARDING."

Mr. WRIGHT.—(Reading:) Q. Mr. Harding, I now call your attention to a copy of a proposal dated Waukesha, Wisconsin, January 4, addressed to the American-Pacific Construction Co., San Francisco, California, and at the bottom "Modern Steel Structural Company" but not signed by that company, and on the bottom, "The American-Pacific Construction Company of San Francisco, California." I will ask you to state whether or not that form of contract is according to your recollection—how that form of contract, according to your recollection, conforms with the contract which you say was executed by the American-Pacific Construction Company, with reference to the structural steel for [88] the Columbia Theatre in San Francisco.

Mr. HUMPHREY.—I object to the admission of the proposal in evidence on the following grounds:

1. It is irrelevant, incompetent and immaterial.
2. It is not the contract alleged, the proposal offered varies in material particulars from the one alleged in defendant's Second Amended Complaint. It was there set forth that the contract was a contract whereby plaintiff was to deliver steel F. O. B. San Francisco, and that the contract was to be performed before September 1st, 1907. The alleged contract that is offered is dated January 4th, 1907, and requires the plaintiff to complete the same within

(Deposition of Samuel B. Harding.)

60 or 90 days. This action is based, as counsel has stated, on a breach of contract for which they seek to recover, as a part of the breach, damages for profits that would be earned. This variance is fatal to their case.

Defendant makes the further objection that an essential element of the contract is missing, namely, the plans, drawings and specifications are not attached and according to the testimony established by decisions in this State that where a contract is made which is to be performed according to the specifications, and the specifications are not attached or established in detail as agreed upon, there is no contract; there is no meeting of minds. This contract is void, would be void even at common law. Under this contract certain work was to be done, which work was to be determined by the plans and specifications. As there are no plans and specifications, there is no meeting of minds on the subject matter of the contract.

The further objection to the admission of the contract in evidence is urged that the contract on its face shows that the proposition is for immediate acceptance, but that, though accepted, does not constitute a contract until approved by an executive [89] officer of the Modern Steel Structural Company. There is no proof that this proposal was ever approved by an executive officer of the plaintiff after its acceptance by the plaintiff.

The objection was then and there overruled and the said proposal admitted in evidence and marked

(Deposition of Samuel B. Harding.)

Plaintiff's Exhibit "K," and the defendant thereupon took an exception to the said ruling of the Court, which exception defendant hereby designates as "Defendant's Exception No. 2."

(Exception No. 2.)

Said Exhibit "K" is in words and figures as follows:

[Plaintiff's Exhibit "K"—Proposal Dated January 4, 1907, Modern Steel Structural Co., to American-Pacific Construction Co.]

"Proposal Form:

Modern Steel Structural Co.

Waukesha, Wis., Jan. 4, 1907.

American-Pacific Construction Co., San Francisco, Cali.

We propose to furnish you in good order the following described structural material, constructed in a workmanlike manner, described as follows and in accordance with drawings furnished by Jos. D. Smedberg and specifications also furnished by J. D. Smedberg, identified with marks:

'Copy #1,' initialed, 'S. B. H. 12/30/06,' excepting as noted under 'REMARKS' on sheet #2 attached.

Namely, the structural steel and iron and re-enforcing steel, (except the grillage beams, bolts, separators and column bases mentioned on page 3 of specifications referred to above) for the Richelieu Syndicate. Theatre and Office Building, known as the Columbia Theatre; Location southeast corner of Van Ness Ave. & Geary St., San Francisco, Cali.

Delivery as follows: That portion indicated by Mr.

Smedberg, shown within red lines on blue prints 3-S, 4-S 7-S, dated by us on back of print as received Dec. 31st, 1906, and 8-S dated by us on back of print as received Jan. 3, 1907, required to begin erection of steel work on stores, to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg. [90]

Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg.

REMARKS: Our proposition is based on the substitution in part (as referring to 'KIND, CHARACTER AND FINISH OF MATERIALS,' beginning page 9, and 'INSPECTION' beginning page 11 of the above specifications) of Manufacturers' Standard Specifications as found in Carnegie's Hand Book.

Mill Test Reports, within said specifications, are proposed, as being satisfactory in the above respects to Mr. Smedberg, and upon his request stating upon which portions of the work he will require such reports, we will comply therewith by furnishing same.

Price to be Seventy-seven Dollars (\$77.00) per ton; Freight allowed to San Francisco, Cali. Correct figured weights of steel to govern amount of sale and all steel work to be accepted at our works by Mr. Smedberg, or his authorized agent.

Terms of payment as follows: 30 days net cash from date of invoices.

Payable in New York, Chicago or Milwaukee Exchange, free of expense to us for the collection charges.

We are responsible for shop errors in work not erected by ourselves and for alterations, whether erected by ourselves or not, only when notified of same in writing before correction is made and given an opportunity and reasonable time to suggest remedy or to ourselves make alterations.

When delays are caused to our men by materials or labor not furnished by us, you agree to pay their time, at our regular rates, and their expenses, while so delayed.

This contract is contingent upon our ability to procure material from the mills, delays of carriers and upon strikes, accidents or other delays unavoidable or beyond our reasonable control.

It is expressly agreed that there are no promises, agreements [91] or understandings outside of this contract and that no agent or salesman has any authority to obligate the Modern Steel Structural Company, by any terms, stipulations or conditions not herein expressed.

The title and right of possession to all material we furnish remains with the Modern Steel Structural Company until the same has been fully paid for in cash.

This proposition is for immediate acceptance, but although accepted does not constitute a contract until approved by an executive officer of the Modern Steel Structural Company, and is subject to change or withdrawal until so approved.

(Deposition of Samuel B. Harding.)

MODERN STEEL STRUCTURAL CO.

By _____.

Approved by _____."

Accepted _____, 190____.

_____.

_____."

The WITNESS.—The copy of the said proposal that I sent to the American-Pacific Construction Company at San Francisco was executed by my signature as president at the bottom of the page in the space provided therefor. This proposal was returned to me on the 21st day of January, 1907, accompanied by the American-Pacific Construction Company's letter of January 15, 1907.

Thereupon plaintiff offered in evidence letter dated San Francisco, January 15, 1907, addressed Modern Steel Structural Company, Waukesha, Wisconsin, and signed American-Pacific Construction Company, Thomas Vigus, its General Manager, which letter was admitted in evidence and marked Plaintiff's Exhibit "L," which letter is in words and figures as follows:

[Plaintiff's Exhibit "L"—Letter Dated January 15, 1907, American-Pacific Construction Co. to Modern Steel Structural Co.]

"Jan. 15, 1907.

Columbia Theatre:

Modern Steel Structural Co.,

Waukesha, Wis.

Gentlemen:—

We have to acknowledge receipt of your favor of

(Deposition of Samuel B. Harding.)

the [92] 11th instant.. We enclose herewith contract signed as suggested in same.

We note what you say in regard to the contract we signed with the Columbia Theatre and are very glad that it met with your approval. So far as the printed matter in the same is concerned it is more in our favor than any contract we would get. What we were particularly anxious to have inserted in same was that everything was to be accepted at your works, and the decision of the engineer was to be final.

We think you have in your possession the full authority in this matter, and trust you will be able to give prompt shipment so as to keep these people from censuring us.

Yours truly,

AMERICAN-PACIFIC CONSTRUCTION
CO.

Per THOMAS VIGUS,
General Manager."

The WITNESS.—(Continuing.) To my certain knowledge this letter contained our accepted proposal. On Exhibit "L" the pencil notation, "Cont. #561," is in my handwriting and signifies that the communication belongs to the contract of that number.

Mr. WRIGHT.—Q. (Reading.) Does it indicate the acceptance of the contract?

Mr. HUMPHREY.—I object to the question as leading, calling for the conclusion of the witness and irrelevant, incompetent and immaterial.

The objection was overruled and exception taken

(Deposition of Samuel B. Harding.)

by the defendant, which exception defendant hereby designates as "Exception No. 3."

(Exception No. 3.)

A. It indicates that I, on receipt of that letter and enclosure gave the job a number, and contract as it were, through which it would be known in our plant by number. That is the [93] custom whenever we receive an accepted contract, to at once give it a number.

The American-Pacific Construction Company, after the contract was signed, sent, or consented to the sending, of a Mr. Smedberg, who remained two or three months. He came here as representing the architects to approve our detail drawings as fast *we* they were prepared, and also to complete the design work for the upper part of the building which the architect had not completed prior to the acceptance of our proposal.

Q. I next call your attention to a specification which is headed "Specification for the Structural Steel and Iron of the Eight Story Office building and theatre to be erected on the southeast corner of Van Ness Avenue and Geary Streets, for The Richelieu Realty Syndicate, San Francisco, Cal.," and at the left-hand corner appearing the names: Frank T. Shea, Architect, San Francisco, and Joseph D. Smedberg, Consulting Engineer, San Francisco.

These specifications consist of 19 pages. I will ask you to look at these specifications and kindly state if you recognize them as being the specifications that you were to work to under the contract

(Deposition of Samuel B. Harding.)

in question. Who furnished you those specifications? (Handing paper to witness.)

A. The American-Pacific Construction Company.

Mr. WRIGHT.—I ask that these specifications be received in evidence.

Mr. HUMPHREY.—They are objected to as irrelevant, incompetent and immaterial, not purporting to be the specifications referred to in the contract. The contract refers to certain specifications endorsed “J. M. D. and S. B. H.,” and also as not being a part of the so-called contract offered in evidence by the plaintiff.

The objection was overruled and an exception taken by the defendant, which exception the defendant hereby designates as [94] “Exception No. 4.”

(Exception No. 4.)

Mr. HUMPHREY.—They are not specifications for all of the work but only a part of the work. It is not contended that they are specifications for all the work.

Mr. TAYLOR.—The specifications for all the work including the plans and all the details.

The COURT.—We are only concerned here with what the witness testified to. The witness testified that those were the specifications they were to work by.

The specifications in question were thereupon admitted in evidence and marked Plaintiff's Exhibit “M” and are in the words and figures as follows:

**[Plaintiff's Exhibit "M"—Specifications of
Building.]**

SPECIFICATIONS.

**THE STRUCTURAL STEEL AND IRON OF AN
EIGHT STORY OFFICE BUILDING
THEATRE**

to be erected on the Southeast corner of
VAN NESS AVENUE & GEARY ST.,
for

THE RICHELIEU REALTY SYNDICATE
San Francisco, Cal.

FRANK T. SHEA,
Architect,
San Francisco.

JOSEPH D. SMEDBERG,
Consulting Engineer,
San Francisco. [96]

SPECIFICATIONS

**THE STRUCTURAL STEEL AND IRON OF
AN EIGHT STORY OFFICE BUILDING
THEATRE.**

to be erected on the Southeast corner of
VAN NESS AVENUE & GEARY ST.,
for

THE RICHELIEU REALTY SYNDICATE
San Francisco, Cal.

FRANK T. SHEA,
Architect,
San Francisco.

JOSEPH D. SMEDBERG,

Consulting Engineer,

San Francisco. [97]

San Francisco, December 21, 1906.

In order to understand the business relations involved in the following specifications, some explanations of them is necessary.

Mr. Joseph D. Smedberg, the Consulting Engineer, is under contract with Mr. Frank T. Shea, Architect, to furnish those parts of the plans and specifications for the Building which relate to the Iron and Steel Frame and Reinforced Concrete work.

He is also under contract with The Richelieu Realty Syndicate to supervise the inspection, to superintend the erection of the steel frame work, to check all bills rendered by the Contractors for this portion of the work, and, in general to see that all the contracts relating to this part of the Building are faithfully fulfilled. The contract for the iron and steel work will be let on a pound basis erected.

A separate set of specifications were prepared for the use of the computers and draftsmen in preparing detail plans.

GENERAL:

The steel construction described in these specifications is that for a new Office Building and Theatre, Southeast corner of Van Ness Avenue and Geary Street, San Francisco, Cal. The Building is in plan 149' x 120' 0'', and is eight stories high above the sidewalk, with basement extending 20' 3'' below ground. (Datum.)

The plan of construction is as follows:

The general plans for the Theatre portion of the Building being incomplete still, the intention is to erect the Office Building portion first and especially rush work on the first section columns, first and second story beams and sidewalk beams. Open holes in columns, beams and girders for connecting Theatre [98] *Catilevers*, etc., will be drilled in the field, as arrangement of theatre framing cannot be determined accurately at present, and this method will not delay any portion of the office building construction, due to lack of information regarding connection.

The contract for grillage, beams and cast-iron pedestals will be made separately in order to have foundations ready for first delivery of steel work, and cause no delay in the erection of frame.

SPECIFICATIONS EXPLAINED:

These specifications are supplemental to the contract already entered into for the constructional iron and steel work of this building, between THE AMERICAN PACIFIC CONSTRUCTION COMPANY, parties of the first part, and RICHELIEU REALTY SYNDICATE, parties of the second part. They are the specifications referred to in the said contract, and which are to be considered a part of that contract.

These specifications are intended to cover all the structural iron work for frame and reinforced concrete in said building. They are intended to co-operate with the drawings for the same, both those furnished by the Architect, and those furnished by the Engineer, as hereinafter specified, and what is called for by either is as binding as if called for by

both. They are intended to describe and provide for a finished piece of work. The Contractor will understand that the steel construction herein described is also to be complete, in every detail and in every portion of the work, and all material entering into it is to be first class and he will be expected to thoroughly understand the construction, and to fully inform himself in regard to any points that he may not clearly understand, for what is herein intended to be described, viz.:

When necessary, or desirable, he must apply to the Architect, or the Engineer, for further details or specifications during [99] construction or before proceeding with his work.

REQUIREMENTS OUTLINED:

This contractor must furnish and set all the iron and steel shown or referred to in these specifications and called for by the said drawings hereinbefore referred to, and when the erection is completed, he must remove all the materials used in performing the work. He must furnish in all cases the exact sections, weights and kinds of material that is called for, or those of approved equivalent strength, and he must follow exact details, methods and instructions called for by these specifications and said drawings. He must set the iron work, as fast as may be considered practical in the judgment of the engineer, always keeping at least one story in advance of the masonry. He will be expected to give this work his personal supervision, or have a man at all times to take care of it.

REFERENCE IN CASE OF DISPUTE:

Should any difference of opinion or dispute arise in relation to the meaning of these specifications, or of the said drawings, furnished by either the Architect or the Engineer, as hereinafter specified, reference must be made to the Engineer, Joseph D. Smedberg, whose decision on all such points shall be final and conclusive.

DRAWINGS:

The general dimensions, arrangements and sections required for the structural iron work herein specified are shown on the general structural iron drawings prepared and furnished by the Engineer.

The sections given are those of the Carnegie Steel Company's manufacture. In general, these drawings are made to scale, but scale dimensions must never be used. These drawings, together with these specifications, are the property of the Architect, to whom all copies must be returned on the completion of the work. [100] Detail or shop drawings required by the Contractor, including drawings of every part and piece of the work, with all the lists, schedules, indexes, erection plans or other directions necessary for the proper manufacture, finish and erection of the work covered by these specifications and the said general drawings will be made and furnished by the Engineer.

Blue prints of the shop drawings, lists and schedules, as many copies of each as are necessary, but not more than five will be furnished to the Contractor, for his use in the manufacture of the material. Another complete set of these prints together

with one complete set of prints of the erection drawings will be furnished to the Contractor for use in erection. One complete set of all the drawings, plans, list and schedules will be furnished to the Inspector. All the above mentioned prints will be furnished by the Architect, free of expense. Additional prints of any of these drawings may be taken by said Contractor or Inspector, if desired, at their own expense, but originals taken from the office for that purpose must be promptly returned.

ORDERS:

All materials required to be furnished or work to be done under these specifications or by the said general structural iron drawings will be ordered by the Engineer from time to time with the shop drawings, lists, schedules, etc., for the same as fast as they can be prepared, and the Contractor for the structural iron work must order no material and perform no work under these specifications until he has received the said detail drawings, lists and schedules for the same. Bolts or other materials used temporarily for erection purposes are not included in this specification.

EXTRAS AND BILLS:

No additional work or material expense, over and above what is called for by said detail drawings, lists and schedules prepared and furnished, as hereinbefore provided will be allowed unless ordered by the Architect in writing. When said detail drawings, [101] lists and schedules are received by the Contractor, they must be immediately examined to determine whether the material and work called for by

the same may be properly classified in the price classification, contained in the contract hereinbefore referred to, and of which these specifications are considered a part, or in any supplemental agreement that may be made to said contract. In case either or both may not be properly classified in said price classification the Engineer must be promptly notified of the fact in writing, and a copy of such notifications must also be sent to the Architect. If no reply, verbal or written, to such notification is received within three days, a second notification must be sent, the same as the first; but, in any case, the work called for by such detailed drawings, lists or schedules must proceed without delay, unless the Contractor shall receive written instructions to the contrary, from the Architect or Engineer.

No bill for extra work ordered by the Architect, as herein provided or not called for by said drawings, lists or schedules will be approved by the Architect, unless it is rendered immediately upon the completion and acceptance of said work. All bills for material or work not properly included in the price classification hereinbefore referred to, must be made separate from the bills for work and material, properly covered by said price classification. All bills must be made sufficiently in detail to permit of their ready classification. The originals of all bills must be sent to the Engineer, Joseph D. Smedberg, and exact duplicate must, at the same time, be sent to RICHELIEU REALTY SYNDICATE, parties of the first part in the contract hereinbefore referred to.

BUILDING LAWS:

This Contractor must comply with all the municipal or corporation ordinances and the laws and regulations relating to buildings in the City of San Francisco, California.

RISKS:

This Contractor will be liable and responsible for any damage [102] to life, limb or property that may arise or occur to any part whatever, either from accident or owing to his negligence, or that of his employees during the operations or constructing or completing the works herein specified.

RUBBISH:

This Contractor must remove from the premises all rubbish arising from his operations, as the work proceeds and at completion of same.

SIGNS:

No signs of any description will be allowed to be placed on or about the building or premises.

CO-OPERATION AND CLEANING UP:

This Contractor must co-operative with the Contractors for the other parts of the building so that when completed, it shall be in accordance with the Architect's design, and a complete and perfect piece of work. He must arrange and carry on his work in such a way that the other Contractor's shall not be delayed, subject always to the Engineer. When his work is finished, he must remove from the premises, all the tools, apparatus, machinery, scaffolding and the debris pertaining to his part of the work and leave the job free from all obstructions.

KIND OF MATERIAL REQUIRED:

All materials required for the trusses and all the material required for the flanges of reveted girders must be open hearth, or Bessmer steel.

All other material required for riveted members and the beams and channels used in the floors, with their connections may be made of Bessmer steel, unless in special cases is shall be otherwise specified.

All machine driven rivets must be steel.

The rods, bolts, anchors, lateral ties and all hand driven rivets must be of wrought iron. [103]

Bering plates in masonry, pedestals under columns, separator, brackets under plates and filler blocks more than 1½ inches thick, must be made of case iron.

CHARACTER AND FINISH OF MATERIALS:

All the steel used in this building must comply with the following specifications:

	Medium Steel	Soft Steel.
Minimum ultimate strength in lbs. per sq. in.....	68,000	60,000
Minimum ultimate strength in lbs. per sq. in.....	60,000
Minimum elastic limits in lbs. per sq. in.....	32,000	30,000
Minimum percentage of elongation in. 8 in.....	22%	26%

Test pieces of medium steel must bend cold 180° about a diameter equal to the thickness of the piece without any sign of fracture on the convex side of the bend. They must also stand the same bend after be-

ing heated, to a light cherry red and quenched in water whose temperature is 82° Fahrenheit.

Soft steel must be used for rivets and medium steel for all other material. All steel must be free from all faults or defects of any kind, or of any indication of unsoundness. Each piece must be straight, free from wind and of proper section. A variation of weight in either way of more than two per cent from that specified shall be cause for rejection.

All wrought iron used in this building must have an ultimate strength of not more than 48,000 pounds per square inch, and elastic limit or not less than 26,000 lbs. per sq. inch and an elongation of 20 per cent in eight inches. The wrought iron required for bolts and rivets must be so ductile that test pieces will bend cold 180° flat without any sign of fracture on the convex side of the bend. All the wrought iron must be perfectly welded in rolling, fibrous, uniform and free from all defects. [104] Each piece must be straight and of proper section.

All the case iron used in this building must be tough gray iron, free from cold shuts, blow holes or other serious defects. Its quality must be such that sample bars one inch square cast in sand moulds must be capable of sustaining on a clear span of four and a half feet a central load of 500 pounds, when tested in the rough bar.

PAINTING:

All iron for the trusses must receive a coat of pure raw linseed oil, at the rolling mills *must* before being loaded on the cars.

The covered surfaces (surfaces in contact and surfaces enclosed) of all parts of riveted members must receive one good coat of graphite paint after the pieces are punched and before they are assembled. All finished members must receive one complete coat of the graphite paint before they are taken from the shop or exposed to the weather. All surfaces that can be reached must have one coat of the graphite paint after erection. All truss members must have two coats of paint in the shop, and the enclosed surfaces of these members must have the two coats before they are assembled. All bolts used in erection and remaining permanently in the building must be dipped in graphite paint before being placed in position.

All pins and bored holes or other planed surfaces in the trusses or columns must be coated with white lead and tallow before leaving the shop.

All painting must be done on dry surfaces and preferably, warm ones. All dirt and foreign matter of any kind must be removed from the iron before painting. All scale must be removed from finished members before painting the first coat in the shop. All scale must be removed from material required for the trusses before it is oiled at the rolling mill.

[105]

The paint used must be a superior graphite paint approved by the Engineer.

INSPECTION:

The shop inspection hereby provided will be made by Inspectors employed by the Engineer.

The contractor for the structural iron must fur-

nish full and ample means for the inspection of all the material called for *buy* these specifications, and of all the work required in fitting such materials for erection, and to this end he shall admit the Architect's Engineer, and Inspectors to any part of the mills, or shops where work under these specifications is being carried on.

To secure proper material as herein specified, one pulling test must be made from every heat or blow of steel, or rolling of iron, and one bending and one quenching test when such requirements are specified, if these are satisfactory, the whole will be accepted. If they are not satisfactory, others may be made as the Inspectors may deem expedient. All tests pieces must be prepared at the expense of the Contractor for the structural iron. The test pieces of rolled steel and wrought iron must be cut out of finished material and must not be less than one-half sq. inch in section. They must be at least ten inches long between filletts when turned down, when possible, they must be cut from the full thickness of the section from which they tests are taken.

The number of test pieces of cast iron must be fixed by the Inspector.

The material used for full sized tests will be paid for at cost, less the scrap value of the material to the Contractors, when the pieces are tested to destruction, and the test proved satisfactory; otherwise, it must be solely at the cost of the Contractor. The use of testing machines capable of testing both specimens of material and the full sized members together with all necessary assistance in handling and

operating the same must be [106] furnished by the Contractor free of all expense.

All surfaces of all materials must be carefully examined by the Inspectors, and all pieces that are a full section, free from flaws, straight and in every way satisfactory, must be accepted. This inspection will not, however, prevent the rejection of any piece at any later time, but before it is riveted in place in the building, if it is discovered that the piece is, in any way, unsuitable, ample assistance must be given by this Contractor to the Inspector in making this examination.

All material manufactured under these specifications must be tested and examined as herein provided, before the same is oiled or loaded on the cars for shipment, from the mill or shop, and as soon after rolling as may be convenient, for the mill or shop, and failure to comply with these specifications will be sufficient cause for the rejection of the material.

The inspection in the shop must in general cover the identification of the material, the accuracy of work and fulfillment of specifications and drawings in every respect, and reports of finished weights and progress of the work, in all of which the Inspector must have ample opportunity to do his work. All rejected material must be made good to the satisfaction of the Inspector.

All long measurements in the shop made by the Inspector must be made with a steel tape, which must be compared with the shop's standard measure to assure their agreement. In case of any disagree-

ment between the inspectors, and the Contractors regarding the inspection appeal may be had to Joseph D. Smedberg, Consulting Engineer. His decision shall be final.

BEAMS:

In general, not more than three eighths of an inch will be allowed by the drawings for clearance at each end of beams connecting two beams, and not more than one-quarter of an inch [107] at each end of beams connecting to columns. All beams supported by connection angles, riveted to the webs, when finished, must measure out to out of such connection, angles not more than the length given on the drawings and not more than one-eighth of an inch less than that length. All beams connecting to columns without connection angles may be $\frac{1}{2}$ inch shorter than shown on the drawings, must must not be longer.

All open holes must be true to the drawings and error in the distance from end to end between the open holes and the flanges at the ends of beams of more than $\frac{1}{16}$ th of an inch must not be approved by the Inspector.

Where connections are marked "Standard," the standard adopted for this particular job must be used. Beams or other materials used in floor construction, excepting bent plates used in connection, must not be heated for bending, cutting or fitting, unless so marked on the drawings.

Beams split or permanently injured by work in the shop must not be used. Beams which are required to be bolted with separators in the building

must be assembled and bolted together in the shop when practicable.

COLUMNS:

The distance from the center of the columns out to the open holes required for the connection of beams must be verified by the Inspector. If, on account of the material over-running in weight or on any other account, these distances are wrong more than $1/16$ th of an inch, the error must be remedied as the Inspector may desire.

All columns must be milled or ground at each end to a smooth bearing surfaces at right angles to the axes of the columns, and Inspector must verify from time to time the adjustment of the machinery used in this work.

All columns must be exactly true to length and any discrepancies [108] in such lengths of more than $1/32$ of an inch must be reported promptly to the Engineer. If more than $1/32$ of an inch too long, they must be milled shorter.

Where columns coming over each other are designed to have the same exterior dimensions, a filler about $1/32$ of an inch thick must be put under the spliced plates where they are riveted to the columns. These fillers must cover the entire area covered by the spliced plates. They will not be drawn on the drawings but will be noted in the bill of material on each drawing where required. Columns must all be straight.

RIVETED GIRDERS:

Web plates must be arranged so as not to project above or below the flange angles. The lines show-

ing the edges of such plates will be omitted from the drawings. In general all stiffener angles must fit tight at both ends.

Open holes and flanges must have the same accuracy required for beams.

All riveted girders must be out of wind before leaving the shop.

Compression members must have all butting ends plained smooth and exactly square to the center line of the member, and they must be assembled in the shop for the fitting of the splice plates and to insure perfect contact throughout. Such members must be entirely free from twists or bends and all work must be neatly finished, and first class in every respect.

CASTINGS:

The cast pedestals required for the columns must be plained, smooth on top and to exact dimensions. All holes for the bolts connecting to the columns must be drilled also to the exact measurements given, and the holes and other castings must be drilled when so marked. All surfaces marked "planed" must be planed smooth and true for a perfect bearing as designed. [109]

RIVETS:

Drifting that is liable to injure the material must not be allowed anywhere in erection.

Shop rivets must be machine driven as far as possible.

Rivets heads must be concentric with the necks of the rivets, and all rivets when driven, must completely fill the holes and be tight.

Rivets will be used in erection wherever possible. All rivets must be uniformly heated.

Holes that do not match sufficiently to admit the rivet without drifting in assembling work in the shop must be reamed.

All riveting must be done to the satisfaction of the Engineer.

ERECTION:

The cast pedestals must be set true and grouted by the Contractor, for the structural iron, both as to plan and as to height, using a surveyor's level for the purpose, but the grouting and the covering of the grillage beams will be done by the owner.

The outside building lines will be given, but the Contractor for the structural iron must determine and fix the interior lines, and each cast base must be set exactly level in its exact position, both as to alignment and to height, and the top surface must be in a truly horizontal plane, supported on wooden wedges before the bedding is run in. The center of each base must be true to the column center as given on the plans with $\frac{1}{16}$ of an inch and its height must be adjusted exactly, using a Surveyor's level and referring to a fixed bench mark. Each base must be bedded with a Portland cement grouting by pouring the same through the center until all the spaces under and inside the base are filled. The cement must be of some imported brand, which must be approved by the Engineer, and the sand must be clean and sharp and fine. The [110] two must be mixed dry in equal quantities in a box, all that is required for one base at one mixing. Enough

water must then be added to make the whole just flow under its own weight. The whole operation of mixing and setting must be done as rapidly as possible, after the bases are set their heights will be inspected by the Engineer, and if they are found to vary more than $1/16$ of an inch from the correct height, they must be taken up and reset.

The use of iron sledges in driving or hammering beams or columns or other structural iron will not be allowed where it can be avoided. Wooden mauls must be used whenever their use is possible. Care must also be exercised to prevent the material from falling, or from being in any way subjected to heavy shocks.

Especial care must be used to keep the columns plumb and in proper line during erection, and they must be plumbed to the satisfaction of the Engineer, as often as may be desired. In case the columns are not kept plumb, the entire work of erection shall stop at the written order of the Engineer to that effect, and the measures to be employed to remedy the defect must be approved by the Engineer before the erection proceeds.

The sections of columns truss members, beams or girders, must nowhere be cut without first obtaining the approval of the Engineer. Every failure of the material to come together properly must be noted and reported daily to the Engineer. If any serious difficulty occurs during erection, it must be reported to the Engineer before any unexpected measures are used to meet the difficulty.

The plan or scheme for the erection of the trusses

(Deposition of Samuel B. Harding.)

and the material connected to the trusses must be submitted to the Engineer before the iron work is erected above the ground floor for their approval.

After the truss members are put in position, before they are [111] materially shadowed by temporary flooring, or any other construction, and after all surfaces are thoroughly dried by the heat of the sun, they shall be protected by water-proof canvas, tarred paper or other materials from further exposure to the weather, such protection to continue until those parts of the building are under the cover of the other construction of the building.

Such protection is desired to prevent water from lodging and remaining in the concealed parts of the work.

Any inaccuracy in the matching of the holes in the columns splices must be removed by reaming and not by drifting.

Temporary timber, bracing must be put in building wherever required by the Architect or Engineer.

The entire work of erection must be done to the satisfaction of both the Architect and the Engineer.

The WITNESS.—(Continuing.) After we received the contract we proceeded with the work of preparing drawings and ordering and fabricating steel. These drawings are here to-day and they were prepared by us after the contract in question was executed. They consist of 31 sheets on tracing cloth.

Mr. WRIGHT.—(Reading:) Mr. Taylor: I will ask the Notary to mark these "Plaintiff's Exhibit

(Deposition of Samuel B. Harding.)

Detailed Drawings, A. B.,” etc., respectively. They are 31 sheets of details on tracing cloth offered as Exhibits A, B, etc., and then when the alphabet is exhausted, A-1, A-2, etc. There are 31 of these sheets and I now offer them in evidence.

Mr. HUMPHREY.—They are objected to as irrelevant, incompetent, and immaterial, no contract having been established and on the further ground that it does not appear that they are a part of the contract, or work undertaken by the plaintiff.

The objection was overruled and exception taken, which exception defendant hereby designated as “Defendant’s Exception No. 5.” [112]

(Exception No. 5.)

(Said 31 sheets here referred to, are attached to this Bill of Exceptions and marked Exhibit “A.”)

The WITNESS.—(Continuing.) These 31 sheets were drawn in reference to the Columbia Theatre building for the American-Pacific Construction Company at the shop of plaintiff, and are part of the necessary work to be done to get out the tonnage.

Q. I will now call your attention to 28 sheets seeming to be detail drawings on tracing cloth; I will ask you to examine those sheets and state what they relate to.

A. They are also detail drawings for the structural steel in the Columbia Theatre building, prepared at our office after receiving the contract.

The work was necessary and was gotten out at the expense of the plaintiff.

Thereupon said 28 sheets were offered and re-

(Deposition of Samuel B. Harding.)

ceived in evidence and marked "Plaintiff's Tracing Drawings."

(Said 28 sheets here referred to are attached to this Bill of Exceptions and marked Exhibit "B.")

Q. Mr. Harding, I now call your attention to 68 sheets of what is known as onion-skin paper, on which is a list of material. I will ask you what these 68 sheets refer to.

A. They relate to the detail drawings heretofore handed you, representing material required as for the respective sheets of drawings. They, in turn, serve as a requisition from which orders are placed with the rolling-mill for the steel.

Thereupon the said 68 sheets were offered and received in evidence and marked "Plaintiff's Exhibit Material List."

(Said 68 sheets here referred to are attached to this Bill of Exceptions and marked Exhibit "C.")

[113]

The WITNESS.—(Continuing.) These exhibits of drawings and material list were all gotten out after the contract was executed. And we then ordered a large quantity of steel to be fabricated at \$38.00 a tone delivered at Waukesha. The rolling-mill paid the freight.

Q. And did you order a sufficient quantity for the job?

A. No, only in part, because the plans were only prepared in part. In other words, we prepare the plans and orders simultaneously.

The WITNESS.—(Continuing.) It is not prac-

(Deposition of Samuel B. Harding.)

tical, according to our contract, for the plans and specifications provide that the steel was not to be ordered until the plans were approved by the architect, and the architect had a representative at our office for the purpose of approving the plans as fast as they were made. Mr. Smedberg was the representative and he approved the details which have been offered in evidence. We fabricated and shipped to the defendant $39\frac{1}{4}$ tons of steel. That shipment was made the first of March, 1907, on car No. 45,373 of the Chicago and Northwestern, and was consigned to the American-Pacific Construction Company, at San Francisco, California. The total weight of the structural steel shipped was 78,470 pounds, or approximately $39\frac{1}{4}$ tons, and at \$77.00 per ton, its value would be \$3,021.09.

Thereupon plaintiff offered in evidence and marked Plaintiffs' Exhibit "N," memorandum of $39\frac{1}{4}$ tons of fabricated material shipped to defendant on March 1st, 1907, which is as follows: [114]

[Plaintiff's Exhibit "N"—Approximate Cost of Steel Fabricated and Shipped to American-Pacific Construction Co.]

Approximate cost of the $39\frac{1}{4}$ tons of steel fabricated and shipped to American-Pacific Construction Company, pursuant to request made in testimony on page 59, line 25 to 29 inclusive, and on page 60, line 1.

$39\frac{1}{4}$ tons of steel at 40 dollars per ton (not \$38.00) as he had to get the material out quick regardless of price paid for raw material.....\$1570.00

(Deposition of Samuel B. Harding.)

Drawings at 90¢ per ton.....	35.33
Shop labor at \$4.80 per ton.....	188.40
Freight at \$15.00 per ton.....	588.75

Approx. total cost of the 39¼ tons....\$2382.48

The WITNESS.—(Continuing.) Immediately after March 1st, 1907, we were going on with the other work. During the whole first six months of the year, 1907, the price of steel delivered at the plaintiff's plant at Waukesha, was \$38.00 a ton. The market value did not vary during said six months, nor did the freight from Waukesha to San Francisco change. The steel that we had contracted for this contract was purchased at \$38.00 a ton delivered at Waukesha.

Q. Now, Mr. Harding, I will ask you if at all times during the months of March, April, May and June, 1907, the plaintiff stood ready and willing to carry out the contract with the defendant?

Mr. HUMPHREY.—We object to that as being leading and calling for the conclusion of the witness.

The objection was overruled and exception taken, which exception defendant designates as "Defendant's Exception No. 6."

(Defendant's Exception No. 6.)

A. It did.

The WITNESS.—(Continuing.) Plaintiff had equipment for [115] carrying out the contract and abundance of shop-room. I am familiar with the size of the building, the plans for the building, specifications and plans of the building known as

(Deposition of Samuel B. Harding.)

the Columbia Theatre Building. I am a technical man. I knew how to interpret the plans and specifications and the ordinances, to decide whether or not the plans and specifications were in accordance with the ordinances or not. I made a complete examination of the plans and specifications, because we were obliged by our contract to furnish a structure in accordance with the ordinances, and upon my investigation I found discrepancies which I reported to the American-Pacific Construction Company, so that they would be corrected.

Thereupon plaintiff offered and had received in evidence letter dated March 26, 1907, addressed to the American-Pacific Construction Company, and signed by the Modern Steel Structural Company, which letter was marked Plaintiff's Exhibit "O," and is in the words and figures as follows:

[Plaintiff's Exhibit "O"—Letter Dated March 26, 1907, Modern Steel Structural Co. to American-Pacific Construction Co.]

(LETTER-HEAD MODERN STEEL STRUCTURAL CO.)

"Waukesha, Wis., March 26, 1907.

Amer.-Pac. Construction Co.,

San Francisco, Cali.

Gentlemen:

Referring to size of material in the Columbia Theatre job, we find that the floor joists are not all to ordinance, and as according to our contract, we are obliged to make them strong enough so that they are up to the ordinance we are increasing the

(Deposition of Samuel B. Harding.)

weight of some of them and making them 10"@30# and 35# beams instead of 10"@25#.

Mr. Smedberg has checked on our sizes and finds them satisfactory.

If, in checking over the column sections, or in checking the sizes of beams in the rear of the building, we find that smaller [116] sizes can be used and still be up to the ordinance, we will do so as it is not our desire to weight up the structure any more than is necessary.

Mr. Smedberg is checking carefully on all of our figures and we shall send you framing plans in a very short time for the office portion of the bldg. up to and including the 7th floor.

Yours truly,

MODERN STEEL STRUCTURAL CO.,

By S. C. CODDINGTON."

The WITNESS.—(Continuing.) From my familiarity with the plans for the Columbia Theatre, its size and dimensions and with its specifications, and from my familiarity with the steel required for such a structure, I would say that 1500 tons, or possibly more, would be required to complete that building.

Q. But 1500 tons at least according to these specifications?

A. Yes, and my reasons for that statement would be this: The American-Pacific Construction Company, through Mr. Vigus, talked of 1400 tons; the architect and his engineer talked of 14 or 1500 tons, as I remember it. Now, the architect's plans—I am speaking now of the original plans from which

(Deposition of Samuel B. Harding.)

we made our detail drawings—were incomplete at the time we began work, and Mr. Smedberg came up for the purpose of completing these drawings, and in so far as we went in examining the original drawings prepared by the architect, we found a number of places where they were not up to the ordinances, and that was the occasion of our writing our letter of March 26, marked Exhibit “O,” calling attention to the discrepancies, and I, therefore, from such investigations, and discrepancies found, think that the building would run up to the 1500 ton mark, if not more, as these increases spoken of are 20 per cent or 25 per cent. Of course, this would not apply to all the structure. [117]

Mr. HUMPHREY.—We ask that all the answer except the word “yes” be stricken from the record on the ground that it is not responsive, and merely attempts to relate a conversation, general in its terms, that it is alleged took place either with the architect for the owner of the property, and not for the defendant or with Mr. Vigus. The conversation is not binding on us.

The objection was overruled and an exception taken, which exception defendant hereby designates as its Exception No. 7.

(Exception No. 7.)

The WITNESS.—(Continuing.) Beginning with the 8th of April and succeeding days, we received communications from the American-Pacific Construction Company. I received on the 8th day of April, 1907, a telegram in the following words:

“San Francisco, Cal., April 8, 1907.

Stop all shipments and all work in Columbia Theater job until further notice.

(Signed) AMERICAN-PACIFIC CONSTRUCTION COMPANY.”

Upon the receipt of that telegram we immediately suspended all the draft work and shop work at our plant at Waukesha.

We received in the due course of mail a letter from the American-Pacific Construction Company dated April 9, 1907, addressed to the Modern Steel Structural Company, Waukesha, Wisconsin.

Thereupon plaintiff offered and had admitted in evidence the above letter, which letter was marked as Plaintiff's Exhibit “P,” and is in the following words:

[Plaintiff's Exhibit “P”—Letter Dated April 9, 1907, American-Pacific Construction Co. to Modern Steel Structural Co.]

“San Francisco, Cali., April 9, 1907.

Modern Steel Structural Co.,

Waukesha, Wis.

Gentlemen:

COLUMBIA THEATRE.

On my return from Los Angeles this morning I find that there is some trouble in the Richelieu Realty Syndicate amongst the [118] stockholders, which has resulted in our wiring you as per confirmation herewith:

‘Stop all shipments and all work in shop Columbia Theatre job until further notice.’

(Deposition of Samuel B. Harding.)

It does not look at this writing as if this job was going to go ahead. There are things in connection with it which I am not at liberty to advise you about at the moment. Will try and get at the real facts tomorrow or the next day and will write you fully. In the meantime, stop all work and make no further shipments as per our instructions.

Mr. Smedberg will undoubtedly get a letter either from Shea or the Richelieu Realty Syndicate informing him that his services are at an end.

Yours truly,

AMERICAN-PACIFIC CONSTRUCTION
CO.,

Per THOMAS VIGUS,
General Manager.

The WITNESS.—(Continuing.) We answered the above telegram under date of April 9, 1907. The paper you have in your hand is a copy of our answer.

Thereupon plaintiff offered and had admitted in evidence and marked Plaintiff's Exhibit "Q" the answer referred to, which is a letter dated April 9, 1907, addressed to the American-Pacific Construction Company, San Francisco, California, and is in the following words:

(Deposition of Samuel B. Harding.)

[Plaintiff's Exhibit "Q"—Letter Dated April 9, 1907, Modern Steel Structural Co. to American-Pacific Construction Co.]

"April 9, 1907.

Amer.-Pac. Cons. Co.,

San Francisco, Cali.

Gentlemen:

We are in receipt of your telegram of April 8th, and you do not ask us to stop letting the material come from the mills which was an order, nor do you ask us to stop progress on the drawings. We presume there is some reason for stopping [119] progress. Will be pleased to know if you have any, or have written us what to expect inasmuch as it interferes seriously with our program now that it is well under way.

Yours truly,

MODERN STEEL STRUCTURAL CO.,

S. B. H.

By S. B. HARDING."

The WITNESS.—(Continuing.) The original of that letter was signed by me.

Plaintiff thereupon offered and had admitted in evidence and marked Plaintiff's Exhibit "R" a telegram dated April 13, 1907, from the American-Pacific Construction Company to the Modern Steel Structural Company, which is in the words and figures as follows:

[Plaintiff's Exhibit "R"—Telegram Dated April 13, 1907, American-Pacific Construction Co. to Modern Steel Structural Co.]

"San Francisco, California, April 13, 1907.

Wire us immediately outside figures settlement Columbia including steel in transit and everything.

AMERICAN-PACIFIC CONSTRUCTION
CO."

Thereupon plaintiff offered and had admitted in evidence and marked Plaintiff's Exhibit "S," a letter dated San Francisco, April 13, 1907, addressed to the Modern Steel Structural Company, and signed by the American-Pacific Construction Co., which was in the words and figures as follows, to wit:

[Plaintiff's Exhibit "S"—Letter Dated April 13, 1907, American-Pacific Construction Co. to Modern Steel Structural Co.]

"San Francisco, Cal., April 13, 1907.

Modern Steel Structural Co.,

Waukesha, Wis.

Gentlemen:

COLUMBIA THEATRE.

We have to confirm our telegram of even date, as per confirmation herewith.

'Wire us immediately outside figure settlement Columbia including steel in transit and everything.'

The Columbia Theatre people have decided not to finish the structural steel. They are getting up a lot of new stockholders [120] to erect a different kind of building. It is rumored on the street (whether it is founded on facts or not, I do not

know) that Messrs. Ruef and Schmitz, who are now indicted by the Grand Jury and are likely to go to jail within a very short time for a term of years (which the people of San Francisco have to congratulate themselves for) were indirectly connected with the Columbia Theatre.

We expect to receive your wire tomorrow stating exactly how much expense you have been put to in this matter, including the cost of the two cars in transit. We will then take up the matter of a full settlement with you and get them off our hands. I have requested them to take up with Mr. Smedberg his position in the matter, and they have no doubt wired him what to do.

Yours very truly,

AMERICAN-PACIFIC CONSTRUCTION
CO.,

Per THOMAS VIGUS,

General Manager."

Plaintiff thereupon offered in evidence a letter dated San Francisco, California, April 15, 1907, addressed to the Modern Steel Structural Company and signed by the American-Pacific Construction Company.

This letter was admitted in evidence and marked Plaintiff's Exhibit "T" and is in the words and figures as follows:

[Plaintiff's Exhibit "T"—Letter Dated April 15, 1907, American-Pacific Construction Co. to Modern Steel Structural Co.]

"April 15, 1907.

Modern Steel Structural Co.,
Waukesha, Wis.

Gentlemen:

COLUMBIA THEATRE:

We have to acknowledge receipt of your favor of the 9th instant, and must state that we are very much surprised at the way in which you handle this matter. In future, if you do not wish to spend the money for a telegram, kindly wire us at our expense. It was up to you to find out by wire what we wanted stopped. [121] We would not have wired you had it not been important.

The Richelieu Realty Syndicate have practically no money to complete their building, and they are trying to organize a new company, and when their organization is complete there is no doubt but that they will erect a class "C" building with wooden joists and brick, and in the meantime, we are waiting to hear from you by wire the outside cost up to date so we can arrange a settlement with your Company. In making this estimate, please bear in mind that we are going to have quite a heavy loss in any event, and we would like to have you put your material and time down to as near cost as you can.

Yours truly,

AMERICAN-PACIFIC CONSTRUCTION
CO.

Per THOMAS VIGUS,
General Manager."

(Deposition of Samuel B. Harding.)

The WITNESS.—(Continuing.) That letter was received by me on the 20th of April, 1907.

Thereupon plaintiff offered and had admitted in evidence and marked Plaintiff's Exhibit "U" a telegram dated April 16, 1907, to the American-Pacific Construction Company from the Modern Steel Structural Co., which telegram is in the words and figures as follows:

[Plaintiff's Exhibit "U"—Telegram Dated April 16, 1907, Modern Steel Structural Co. to American-Pacific Construction Co.]

"April 16, 1907.

Amer. Pac. Cons. Co.,
536 Polk St.,
San Francisco, Cali.

Cancellation price theatre steel \$30,230.00, which represents our irretrievable loss if job not completed.

MODERN STEEL STRUCTURAL CO."

Plaintiff thereupon offered and had admitted in evidence a letter addressed to the American-Pacific Construction Company, San Francisco, California, and signed by the Modern Steel Structural Company, which letter was admitted in evidence, and [122] marked Plaintiff Exhibit "V," and is in the words and figures as follows:

[Plaintiff's Exhibit "V"—Letter Dated April 20, 1907, Modern Steel Structural Co. to American-Pacific Construction Co.]

"April 20, 1907.

Amer. Pac. Cons. Co.,
San Francisco, Cali.

Gentlemen:

CANCELLATION PRICE.

We confirm telegram sent you giving you our cancellation price of Columbia Theatre contract as follows:

'Cancellation price Theatre steel \$30230.00, which represents our irretrievable loss if job not completed.'

We have your letter of April 15, and by this time, you will have received our letter which preceded the above telegram, advising you that we were getting at the status of the above contract with the rolling mills and would wire you as soon as we had all information in and it was utterly impossible for us to give you cancellation price earlier than we did. Of course, we might have sent you a telegram advising you what we were doing and explaining why it would take some time to answer your wire and letters requesting cancellation price.

It would seem the wise thing for the Richelieu Realty Syndicate to proceed with the building as planned, now that it is so far under way and that it would be easier for them to do this and have a good

building than to change to cheaper construction, throwing away what has already been done.

Yours truly,

MODERN STEEL STRUCTURAL CO.

F. W. H.

By F. W. HARDING."

Plaintiff thereupon offered and had admitted in evidence and marked Plaintiff's Exhibit "W" a letter dated San Francisco, California, April 22, 1907, addressed to the Modern Steel Structural Company, Waukesha, Wisconsin, signed American-Pacific Construction [123] Company, which letter is in the words and figures as follows:

[Plaintiff's Exhibit "W"—Letter Dated April 22, 1907, American-Pacific Construction Co. to Modern Steel Structural Co.]

"San Francisco, California, April 22, 1907.

Modern Steel Structural Co.,

Waukesha, Wis.

Gentlemen:

COLUMBIA THEATRE.

We have exchanged telegrams with you in regard to this matter but have not a very clear idea of just exactly what you want. We have two cars of steel on the way here for this job. Your telegram reads that it will cost \$30,000, for us to settle with you for everything. How much steel do we get in addition to the cars on the way for this amount of money?

Please write us a letter explaining to us in full what we get for our money in order for me to settle with the Columbia Theatre people. We will have to

(Deposition of Samuel B. Harding.)

settle with you and no doubt bring an attachment and suit against these people to collect ours.

(Signed)

AMERICAN-PACIFIC CONSTRUCTION
COMPANY,

Per THOMAS VIGUS,
General Manager."

The WITNESS.—(Continuing.) That letter was received in due course of mail on the 27th day of April, 1907.

Plaintiff thereupon offered and had admitted in evidence, and marked Plaintiff's Exhibit "X," a letter dated April 24, 1907, addressed Amer. Pac. Cons. Co., San Francisco, California, and signed Modern Steel Structural Company, which letter is in the following words and figures:

[Plaintiff's Exhibit "X"—Letter Dated April 24, 1907, Modern Steel Structural Co. to American-Pacific Construction Co.]

"April 24, 1907.

Amer.-Pac. Cons. Co.,
San Francisco, Cali.

Gentlemen:

We enclose you our invoice amounting to \$3021.09 covering material shipped to date applying on the Columbia Theatre Building, [124] the contract for which, you wish to cancel.

As we have already a considerable investment in this job, we would appreciate an early remittance to cover, at least, this invoice.

In this connection permit us to ask what is delaying final payment. * * *

(Signed) MODERN STEEL STRUCTURAL CO.

By R. H. SIMPSON."

Plaintiff thereupon offered in evidence a letter dated May 11th, 1907, addressed to the American-Pacific Construction Company, San Francisco, Cal., signed Modern Steel Structural Company; said letter was admitted in evidence and marked Plaintiff's Exhibit "Y," and is in the words and figures as follows:

[Plaintiff's Exhibit "Y"—Letter Dated May 11, 1907, Modern Steel Structural Co. to American-Pacific Construction Co.]

"May 11, 1907.

American-Pacific Construction Co.,
San Francisco, Cal.

Gentlemen:

Attention—Thomas Vigus, Gen. Mgr.

S. B. Harding and the writer have been almost constantly absent from the office since the receipt of your letter dated Apr. 22nd.

You will note from a former letter received from us on this subject, that one item of loss on account of the cancellation of contract is our unused shop space for the time we would have been getting out the Columbia work. This is effecting us right now, and our shop is only running about half its capacity. We had reserved the space for this job, and you will realize that it is almost impossible to fill a shop with structural work on short notice.

You ask us how much steel you get in addition to the cars already shipped:—We have included in cancellation price all the steel which has been actually shipped from the mills, or in our yard for this contract, amounting to 306000 pounds, and this much [125] is included, but we have not figured fabricating it, of course.

Regarding the two I-beams reported short by Oscar Daniels on the Bullock-Jones Building, our shipping lists show all material checked off, and loaded on the cars. If you would send us the marking numbers from the plans of these two beams, we will get them out again, but presume that you have provided for them elsewhere to save time.

Yours truly,

MODERN STEEL STRUCTURAL CO.,

F. W. H.

By F. W. HARDING."

Plaintiff thereupon offered and had admitted in evidence and marked Plaintiff's Exhibit "Z," a letter dated San Francisco, California, May 18, 1907, addressed to the Modern Steel Structural Company, Waukesha, Wisconsin, and signed American-Pacific Construction Company, which said letter is in the words and figures as follows:

(Deposition of Samuel B. Harding.)

[Plaintiff's Exhibit "Z"—Letter Dated May 18, 1907, American-Pacific Construction Co. to Modern Steel Structural Co.]

"San Francisco, California, May 18, 1907.

Modern Steel Structural Company,

Waukesha, Wisconsin.

Gentlemen:

COLUMBIA THEATRE:

This job will undoubtedly go ahead, reinforced, using such steel as is on hand and the balance will be finished in reinforced work. They are raising a new corporation with some heavy men going in as stockholders.

Owing to the financial flurry over our municipal affairs and the tying up of all work trying to bring about the open shop policy in the city the matter is dormant. We hope, however, within a few weeks that they will be in shape to go ahead again.

Yours truly,

AMERICAN-PACIFIC CONSTRUCTION
CO.

Per THOMAS VIGUS." [126]

The WITNESS.—(Continuing.) Reinforced work means a concrete and steel combination—no structural steel in connection. In my judgment it does not imply the use of structural steel, but simply rods.

Thereupon plaintiff offered and had admitted in evidence and marked Plaintiff's Exhibit "A-1" a letter dated May 20th, 1907, at San Francisco, California, addressed to the Modern Steel Structural Company, and signed by the American-Pacific Con-

struction Company, which letter is in the words and figures as follows:

[Plaintiff's Exhibit "A-1"—Letter Dated May 20, 1907, American-Pacific Construction Co. to Modern Steel Structural Co.]

"May 20, 1907.

Modern Steel Structural Co.,
Waukesha, Wis.

Gentlemen:

COLUMBIA THEATRE.

Referring to your claim of \$30,000 in settlement of all steel on the Columbia Theatre, less the amount of your invoice for the car shipped, please furnish us with an itemized account for this amount. Our definition of an itemized account is—what steel you have on hand from the mill—whether I-beams, columns or channels and their approximate weight and lengths, and if any material is fabricated—a full list of what it is.

In regard to the loss of shop space we would like very much to have you explain to this Company just exactly what you mean by that. From our previous experience with your Company you were always overcrowded with work and it was impossible for you to make delivery, and while we are not disputing your claim we are at a loss to understand how the loss of shop space comes in.

Please understand we require this explanation in order to explain fully to the Owners of this building why we are making a demand on them for the amount claimed by you. [127]

Your prompt attention to this matter will oblige,

Yours truly,

AMERICAN-PACIFIC CONSTRUCTION
CO.

Per THOMAS VIGUS,
General Manager."

Plaintiff thereupon offered and had admitted in evidence and marked Plaintiff's Exhibit "B-1" a carbon copy of a letter dated May 24th, 1907, addressed to the American-Pacific Construction Company, San Francisco, California, signed Modern Steel Structural Company, which letter is in the words and figures as follows:

[Plaintiff's Exhibit "B-1"—Letter Dated May 24, 1907, Modern Steel Structural Co. to American-Pacific Construction Co.]

"May 24, 1907.

American-Pacific Construction Co.,
San Francisco, Cal.

Gentlemen:

We acknowledge receipt of your letter of May 18th and are not pleased at the way you are allowing payments on the Theatre job to stand. The time has arrived when settlement should be promptly made in the amount of the cancellation price submitted, or else, we be allowed to complete the contract.

If this matter does not have your immediate attention, we will be forced, as a matter of course, to protect our interests, which we trust will not be necessary for us to take steps to accomplish.

Payment on the steel already shipped is long past due and draft covering this amount and amount due on the Bullock & Jones Bldg. having been returned unpaid forces us to write as above.

As previously advised, settlement of this matter is to be made with this office.

Yours truly,

MODERN STEEL STRUCTURAL CO.

S. B. H.

By S. B. HARDING."

The plaintiff thereupon offered and had admitted in evidence [128] and marked Plaintiff's Exhibit "C-1" a letter dated May 28, 1907, addressed to Thomas Vigus, General Manager of the American-Pacific Construction Company, San Francisco, California, and signed Modern Steel Structural Company, which letter is in the words and figures as follows:

[Plaintiff's Exhibit "C-1"—Letter Dated May 28, 1907, Modern Steel Structural Co. to Thomas Vigus, General Mgr., American-Pacific Construction Co.]

"May 28, 1907.

Thos. Vigus, Gen. Mgr.,

American-Pacific Construction Company,
San Francisco, California.

Dear Sir:

Referring to your letter of May 20th, we hand you statement including the items which make up our cancellation price on the Columbia Theatre.

You will note that we place the figure for unused shop space on account of not putting through this

(Deposition of Samuel B. Harding.)

work at \$20183.24. This represents what we figure to be out actual loss on account of not having this contract to put through the shop.

According to our schedule, we could have been working almost entirely on this contract the past three or four weeks and it would also be furnishing us the greater part of our work for another month or six weeks. When we take a job of this kind, we make a schedule to absolutely take care of it as provided by contract. We have taken no other work which we could turn to to take the place of Columbia job in our shop. We could easily fully satisfy you as to the reasonableness of the figure we have placed on our unused shop space, should you come on and visit our plant at this time, or could you have seen it during the past few weeks.

The material is here subject to your order, as well as the shop drawings, when you give us acceptance of cancellation proposition. May we not have immediate attention given to this matter by you.

Yours truly,

MODERN STEEL STRUCTURAL CO. [129]

By F. W. HARDING."

The WITNESS.—(Continuing.) The paper you hand me is the account which was enclosed in that letter, and that account is in the words and figures as follows:

"Waukesha, Wisconsin, May 28, 1907.

Following are the items which make up our cancellation price on Columbia Theater contract:

Material as per accompanying 4 sheets— weight—275481 lbs. at \$1.90, unloaded in our yard	\$ 5234.14
Car of steel invoiced	3021.09
Expenses and advanced J. D. Smedberg...	350.00
Shop drawings.....	1441.53
Unused shop space lying idle.....	20183.24
<hr/>	
Total.....	\$30230.00

Plaintiff then offered and had admitted in evidence and marked Plaintiff's Exhibit "D-1" a letter dated San Francisco, California, May 31, 1907, addressed Modern Steel Structural Company, Waukesha, Wisconsin, and signed American-Pacific Construction Company, Thomas Vigus, General Manager, which letter is in the words and figures as follows:

[Plaintiff's Exhibit "D-1"—Letter Dated May 31, 1907, American-Pacific Construction Co. to Modern Steel Structural Co.]

"May 31, 1907.

Modern Steel Structural Co.,
Waukesha, Wisconsin,

COLUMBIA THEATRE.

Gentlemen:

We expect a reply not later than Wednesday or Thursday, of the coming week in regard to the settlement of this account, and on receipt of information from the Richelieu Realty Syndicate people will immediately take up the matter of settlement with you.

We note you state that you are displeased with the

way we are allowing the payment of this job to stand. We must take exception to your remarks as we have not allowed it to stand at all, as the first shipment of the material has practically only arrived and [130] it to the amount of only \$3,000.

If these people do not make an immediate settlement of the account or furnish us security for same we will have to bring suit against them, which we think will bring them to time.

Yours truly,

AMERICAN-PACIFIC CONSTRUCTION
CO.

Per THOMAS VIGUS,
General Manager."

Plaintiff then offered and had admitted in evidence and marked Plaintiff's Exhibit "E-1," a letter dated June 12, 1907, addressed Amer. Pac. Cons. Co., San Francisco, California, and signed Modern Steel Structural Company, which letter is in the words and figures as follows, to wit:

[Plaintiff's Exhibit "E-1"—Letter Dated June 12, 1907, Modern Steel Structural Co. to American-Pacific Construction Co.]

"June 12, 1907.

Amer. Pac. Cons. Co.,
San Francisco, Cali.

Gentlemen:

COLUMBIA THEATER SETTLEMENT.

Replying to Mr. Vigus' favor of May 31st, we are glad to note that you are working on this case but we note from dates given in your letter that we should

(Deposition of Samuel B. Harding.)

by now have advices as to how the matter was coming out.

Regarding payment of \$3021.09, you are certainly mistaken in the time which this payment is due. Kindly refer to the contract which reads as follows: '30 days net cash from date of invoices.'

Yours truly,

MODERN STEEL STRUCTURAL CO.

S. B. H. By S. B. HARDING." [131]

P. S. Shipment of the above material was made March 1st and payment was due April 1st and by the time this reaches you will be two and one-half months overdue. We think we are entitled to payment at once for this account and are therefore drawing on you today—for this amount."

Plaintiff thereupon offered and had admitted in evidence and marked Plaintiff's Exhibit "F-1," a draft in the words and figures as follows:

[Plaintiff's Exhibit "F-1"—Draft Dated June 12, 1907, Drawn by R. H. Simpson in Favor of R. B. Breese.]

"Waukesha, Wisconsin, June 12, 1907.

At sight Pay to the order of R. B. Breese, Cashier, \$3021.09, value received and charge to the account of Modern Steel Structural Co.

By R. H. SIMPSON,
Sec. and Asst. Treasurer.

To American-Pacific Construction Company,
San Francisco, California."

The WITNESS.—(Continuing.) That draft was for steel shipped. It was not paid and had nothing

(Deposition of Samuel B. Harding.)

to do with the plaintiff's damages for breach of contract.

I have had many years experience in operating and fabricating steel, and I am able to state from actual knowledge what would have been the cost, or what was the cost, of shop labor in fabricating structural steel for a job like the one for the Columbia Theatre during the first six months of the year 1907. It was worth \$4.80 a ton. That was a reasonable cost of shop labor and includes the work of the journeyman who work with their hands in the actual production of the work. It does not include the superintendents or office help, whose time goes on—that is, all of the head officers and heads of departments—their salaries go on whether there is any work in the shop or not. The journeymen drill out holes, punch, assembly, rivet, paint and load the steel and other things. In the \$4.80 a ton is included the work of the journeymen. [132] If we had been permitted to furnish, under the contract in question, the full 1500 tons of structural steel for the Columbia Theatre, the detailed drawings for that job would cost 90 cents a ton, or \$1,350, and it would still cost to complete those drawings \$680.72. That sum would have covered all of the expenses in the completing of the detailed drawings. That does not include the labor of the head draughtsman, but relates to the journeymen labor alone. As the cost of completing the work by such journeymen for steel not fabricated would be only \$4.80 a ton. Freight to San Francisco during the whole first six months of the

(Deposition of Samuel B. Harding.)

year 1907 was \$15 a ton. I know the freight rate from Waukesha to San Francisco during that time remained at that figure because we had other business going to the Pacific Coast both before and after this date, at the same rate per ton. The freight for shipment of 1460 $\frac{3}{4}$ tons, that were not delivered, would amount to somewhere about \$23,000.

Q. Are you sure? A. \$21,911.25.

Q. Assuming that the contract between the plaintiff and the defendant, to which you have testified, was entered into in January, 1907, embracing 1,500 tons of structural steel, so-called, and assuming that there had been shipped on that contract 391 $\frac{1}{4}$ tons, how many tons did that leave still to be furnished?

A. 1460 $\frac{3}{4}$ tons.

The WITNESS.—(Continuing.) Unfabricated material delivered from the rolling-mills in the east, free on board cars Waukesha, Wisconsin, would have cost the plaintiff \$38 per ton, or \$55,508.50 for the remaining 1460 $\frac{3}{4}$ tons, not furnished under the contract.

Q. Had you a rate or contract, whereby you were to get the material delivered at Waukesha, Wisconsin, at your plant, at \$38.00 a ton?

Mr. HUMPHREY.—We object to that on the ground that the contract is the best evidence; it ought to be produced.

The COURT.—What is the answer to the question, Mr. Wright. [133]

Mr. WRIGHT.—“We had.”

(Deposition of Samuel B. Harding.)

The COURT.—If the contract was subsequently put in.

Mr. HUMPHREY.—If it was I do not know anything about it. It was not as a part of the examination of the plaintiff.

Mr. TAYLOR.—You asked for it.

Mr. HUMPHREY.—We asked for it, yes; this is one of my reasons for objection to the deposition.

Mr. WRIGHT.—It is here.

Q. You have now spoken of the cost of journeyman labor to have completed this contract with the defendant if you had been permitted to carry it out; you have spoken of the additional cost to the plaintiff to have completed the detail drawings; now what other items of cost would have been incident to the completion of this job?

A. Such things as paint, coal, fuel oil, paint brushes and punches.

Q. Are you able to state what it would have cost the plaintiff for these respective items you have just enumerated, to have completed the entire 1500 tons of structural steel for the Columbia Theatre job?

A. Yes.

Q. State it. A. \$375.00 for paint.

Q. What kind of paint? A. Graphite paint.

Q. Was that deducted? A. Yes.

Q. And it was provided to be graphite paint by the specifications? A. Yes.

Q. And for the other items, what?

A. For coal \$162.00; for fuel oil \$72.00; for paint brushes \$50.00; for punches \$35.00. In all \$694.00.

(Deposition of Samuel B. Harding.)

Q. Now, this last group of items which you have enumerated, with the cost each would have added, if the whole 1,500 tons had been fabricated, aggregated the sum of \$694.00? A. Yes. [134]

Q. And do these items added—does this sum \$694.00, added to what you have given as what would have been the cost for journeymen's shop labor and the drafting and the price of material to be brought for the work, laid down, embrace the whole of the cost to which the plaintiff would have been subjected if it had carried out the contract? A. Yes.

Q. I revert back now to the journeymen's shop labor. The total journeymen's shop labor for the entire job of 1,500 tons would have cost how much?

A. \$7,200.00.

Q. How much of that shop labor had been done at the time the defendant told you to stop?

A. \$328.64.

Q. How much shop labor still remained to be done to have completed the 1,500 tons?

A. \$6,871.36.

Q. When the defendant told you to stop; that it would receive no more steel; that under no circumstances it would use it, you did stop, did you?

A. Yes.

Q. You stopped because you had to? A. Yes.

Q. Your contract, as I understand, required the defendant to pay you \$75.00 a ton for all structural steel required for the Columbia Theatre?

A. \$77.00.

Q. \$77.00? A. Yes, sir.

(Deposition of Samuel B. Harding.)

Q. Now, \$77.00 per ton for 1500 tons, amounts to how much? A. \$115,500.

Q. And the deducting of these things which you say would have been the cost to your company for completing the contract would leave what balance due your company?

A. \$34,470, being \$35,160.17 less \$694 testified to relative to such cost as paints, coal, fuel oil, paint brushes, etc.

Mr. WRIGHT.—That is all the direct examination.

The COURT.—Have you got that contract (referring to the [135] contract which witness testified that plaintiff had for the delivery of unfabricated steel to its work at \$38 a ton).

Mr. HUMPHREY.—These contracts do not purport to be contracts particularly for this steel alone, but for general steel.

Cross-examination by Mr. HUMPHREY.

The WITNESS.—The plaintiff fabricated 391¼ tons of steel, when it received the order to stop. It began fabricating steel under its alleged contract in January, 1907. Between the dates the plaintiff began fabricating steel for this contract and the date it stopped, it had a few other small orders mixed in with it. We had other work. These orders filled about a quarter or a third of our capacity. I will furnish you with a statement showing all the work done, the cost of that work, the contract price, and for whom it was done, during the same period that we were fabricating the work for the American-

(Deposition of Samuel B. Harding.)

Pacific Construction Company.

Mr. TAYLOR.—While the witness is promising to furnish a starter on behalf of the plaintiff, I insist that it does not grow out of the direct examination, and it is absolutely immaterial and irrelevant to any of the issues in the case at bar. In the case at bar the criterion of recovery is the basis of contract price, if it had been permitted to carry out the contract.

Mr. HUMPHREY.—In order that there may be no misunderstanding of the ground on which the plaintiff is prosecuting this action, I ask you to state your theory of the case in order that I may proceed in my examination in the knowledge of that theory.

Mr. TAYLOR.—The theory contended for by the plaintiff is explicitly stated in the petition. It is that there was a contract for the structural steel to be furnished as mentioned in the petition; that the plaintiff was ready, able and willing to carry out that contract; that it proceeded to do so until it was prevented and hindered by the defendant; and therefore the plaintiff is entitled to recover the contract price of the total amount it was to have [136] furnished, less what it would have cost the plaintiff to have completed the contract, including raw material, shop labor, journeyman labor and freights.

The WITNESS.—(Continuing.) To fulfill the contract set out in plaintiff's complaint, one-third of the works of the Modern Steel Structural Company would be required for from sixty to ninety days after April 1, 1907, the plaintiff received and carried

(Deposition of Samuel B. Harding.)

out contracts. I shall furnish you the same information in connection with these contracts which I have already promised to furnish in reference to the contracts fulfilled by the plaintiff between the date it began work under the contract with the American-Pacific Construction Company to and including the date on which it received instructions to stop.

The WITNESS.—(Continuing.) In the contract for the fabricating of the 1500 tons of steel for a building such as the Columbia Theatre, the percentage of loss by errors of workmanship, either by the journeymen or faulty material furnished or mistakes in cutting or fabricating is about one-half of one per cent, but my estimated labor cost is liberal enough to include that loss. We do not have any loss of steel as that is done with mechanical exactness. The loss on journeymen labor is included in the estimate of cost of completion. On the figures \$6,871.36, the exact loss of journeymen labor to have completed the job, without making allowance for the percentage of loss, is \$470 per ton. It is impossible to give the exact figure as there is a human element entering in there. Mistakes are liable to happen. We have made some mistakes on the \$375,000 job we had at another time. The mistakes amounted to about \$74. The actual shop labor cost of fabricating steel is \$4.70 per ton—but we add 5 cents a ton as an allowance for mistakes for the class of structure of the Columbia Theatre. We have filled contracts for steel of the class desired by the Columbia [137] Theatre in which the journeymen labor was

(Deposition of Samuel B. Harding.)

as low as \$4.75 a ton and lower. One, in particular, was the Schlitz Brewing Company in Milwaukee, the date of which I do not know, offhand, but it was in 1907, or before.

In giving the statement that our profits would have been \$34,474.17, if the contract had been completed, I took into consideration that plaintiff would have been required to use up more time if it completed the contract than it consumed. I arrived at the figure, \$34,470, as being the balance due plaintiff over and above the cost of the work, by adding together all of the costs of material and labor that we would have had to purchase to complete the contract, including freight as follows:

Freight — \$21,900.25; shop labor — \$6,871.30; journeyman drawing labor, \$680.72; and \$694, for supplies, \$3,021.29 for fabricating steel already delivered; the item of \$4,000 worth of steel that we had left over, or more.

Q. Mr. Harding, I am only asking you for an explanation of the items that you testified to in your direct examination, and you stated nothing about steel being left over. A. Yes.

The WITNESS.—(Continuing.) I am not prepared to say what the 39 $\frac{1}{4}$ tons of steel already delivered cost the plaintiff, without looking at the books, and even then I cannot say whether we can find out, because the records are not separate for that particular amount of tonnage. The cost of steel, per ton, was \$38 on the cars at Waukesha, before the plaintiff did any work on it, and it cost 13 cents per ton to

(Deposition of Samuel B. Harding.)

take the steel from the cars into the plaintiff's yard. There is no other charge for cartage or drayage. The item of \$9.73 for cartage and freight on the 39 $\frac{1}{4}$ tons of steel, that is mentioned in the first amended complaint was incorrect, because we were under a moral and verbal obligation to get this 39 $\frac{1}{4}$ [138] tons of steel out quickly, and ship it regardless of expense, and there is a part of this 39 $\frac{1}{4}$ tons that we were required to purchase on what is called "stock" or "store" in Chicago. When that steel came to us, it came by local freight, which meant teaming from the station, as the railroad company does not deliver local shipments into the yard. By "local shipments" I mean less than a carload shipment. I do not segregate the cost for the fabrication of the 39 $\frac{1}{4}$ tons of steel from the rest of the contract. We have it running by pay-roll dates, so that it might be arrived at approximately by examination of the cost records, but it cannot be figured out accurately because we were working at the same time in our shop and drawing-room on other parts of the structure, other than the 39 $\frac{1}{4}$ tons. We would be able to itemize it, except for the matter of drawing costs and some work we had done in our templet shop; other than this, I do not know the total cost of plaintiff's labor up to the time of shipment, but I will annex to my deposition a statement showing the exact cost to plaintiff up to the completion of the 39 $\frac{1}{4}$ tons. It cannot be called accurate because our records do not show what part of the structure the labor is on or has been applied to. It only shows

(Deposition of Samuel B. Harding.)

labor has been applied within certain dates. I will itemize the entire cost to plaintiff up to the time when the 391¼ tons of steel was completed.

Pursuant to this promise, the witness annexed the following statement to his deposition:

Net cost of contract No. 561 with American-Pacific Construction Company, including amount shipped—namely: 311¼ tons (exclusive of cost of overhead expenses), between the date work was started and the date on which work was stopped, pursuant to instructions.

Pursuant to request made in testimony on page 51, line 23 to 28, inclusive. [139]

322500# steel & material bought.....	\$6191.33
Drawing labor on all work done between	
dates above	885.12
Shop labor on all work done between dates..	841.32
Incoming freight	9.73
Miscellaneous expense	14.99
Freight on shipment of 391¼ tons.....	588.75

Total Cost\$8531.24

Approximate cost of the 391¼ tons of steel fabricated and shipped to American-Pacific Construction Company, pursuant to request made in testimony on page 59, line 25 to 29, inclusive, and on page 60, line 1.

391¼ tons of steel at 40 dollars per ton (not \$38.00) (as we had to get the material out quick regardless of price paid for raw material)\$1570.00

(Deposition of Samuel B. Harding.)

Drawings at 90¢ per ton	35.33
Shop labor at \$4.80 per ton	188.40
Freight at \$15.00 per ton	588.75

Approx. total cost of the 391¼ tons.....\$2382.48

The WITNESS.—(Continuing.) We did no work after April, 1907, the day on which I received the telegram to stop.

Q. It is also a fact, is it not, that the only work that you did under this contract was the fabrication of 391¼ tons of steel?

A. Yes; and the preparation of some templets, etc., for the plans.

Q. Then, I understand that the entire work that has been done by the Modern Steel Structural Company under this contract consists of the fabrication of 391¼ tons of steel, which you delivered to the American-Pacific Construction Company at San Francisco, California, the preparation of drawings for the 391¼ tons of steel which had been delivered, and for work that you expected to do, and the preparation of templets for the work that was delivered and for future work.

A. Yes. And the ordering of steel. [140]

Q. Now, is there any cost to the ordering of steel?

A. We do that with our office force under the head of overhead expenses.

Q. Mr. Harding, in answer to your counsel on direct examination in which you stated the cost to the Modern Steel Structural Company for completing this contract with the American-Pacific Con-

(Deposition of Samuel B. Harding.)

struction Company, did you include anything on account of the overhead expenses of the Modern Structural Company, or did you include any part of your overhead expenses as part of that cost?

A. Yes; the items of supply that I mentioned as amounting to \$694.00 are always carried in our overhead expenses, but we credited you with what we thought would be right in that respect.

The WITNESS.—(Continuing.) I understand by the words “overhead expenses” those that go on in a manufacturing plant whether we have a little more or a little less business. In general, they are of such character as officers’ salaries, salaries of superintendents of departments, bookkeepers and clerks, watchmen and police and those with salaries that run on our books by the month; foreman of departments and such things as taxes, insurance, depreciation of plant, coal and supplies. Generally speaking, that would cover the items of overhead expenses. I do not know because we do not keep a record of the overhead expenses of the plaintiff for the months of January, February, March, April, May, June, July and August, 1907, nor can I give the average without referring to memoranda. But I will have a transcript of the books showing these expenses annexed to the deposition.

(Pursuant to this promise the witness annexed to his deposition a statement showing the overhead expenses of the Modern Steel Structural Company for the year in which the American-Pacific Construction Company’s work was started and partly

(Deposition of Samuel B. Harding.)

done was an average of \$7,171.23 per month or \$86,055.76 for the year.) [141]

The WITNESS.—(Continuing.) When the Modern Steel Structural Company receives a contract, the President and Treasurer, the salaried employees of the company, whose salaries are part of the overhead expenses, analyze the contract, and it then receives the attention of the General Manager who outlines what we call “a work sheet,” so that all the departments may have the benefit of his experience and his point of view. This General Manager is a part of the plaintiff’s overhead expenses. After this work sheet is prepared; it goes to the various departments having to do with it, and work is begun. Draftsmen begin the preparation of the drawings and our office department orders steel, while our structural shop prepares templet and fabricating work. The salaries of the Superintendents of these various departments are included as a part of the overhead expense. The respective Superintendents supervise the work on these drawings. The steel is ordered through the purchasing department, the expense of which is entirely included under overhead expense, because this contract with the American-Pacific Construction Company, if it were completed, would have entailed the preparation of other drawings, and the supervision of them by the President and General Manager and the superintendents of the various departments, and would also require the attention of the purchasing department. And would consume one-third of the capacity of the plain-

(Deposition of Samuel B. Harding.)

tiff's plant for a period of from sixty to ninety days after the receipt of the approved detailed drawings.

Question.—The drawings were never completed or approved or delivered? A. In part; yes.

Q. You never received completed drawings for all this work? A. We were preparing the drawings.

Q. The drawings were only completed in part?

A. Yes.

The WITNESS.—(Continuing.) [142] The further execution of this contract, after the delivery of the 391¼ tons, would require one-third of the capacity of plaintiff's plant and one-third of the office force, as well as the attention of the superintendents of the various departments, the General Manager, and the executive officers of this company, for a period of from sixty to ninety days. The price of steel to plaintiff delivered free on board the train at Waukesha was \$38.00 a ton, and it would cost us to fabricate that steel in accordance with the contract \$4.80 a ton and freight to San Francisco was \$15.00 a ton.

Q. Was the freight to be prepared at Waukesha by you?

A. No; freight was allowed in our price.

Q. Well, you mean the price you made of \$77 per ton in the contract was F. O. B. Waukesha?

A. Yes; with freight allowed to San Francisco.

Q. That is, they might pay the freight and deduct it from the \$77.00? A. Yes, sir.

Q. In figuring what it would cost you to complete the contract with the American-Pacific Construction Company, you did not take into consideration, as

(Deposition of Samuel B. Harding.)

such, the depreciation of your plant, did you?

A. O, yes.

Q. Under what head?

A. Item of overhead expenses.

Q. I know, but you did not include that?

A. No.

Q. You did not include that as an element of cost, in your completion of this contract? A. No.

Q. Did you include in your cost, as given in answer to your attorney, anything for the cost of inspection and testing here, before [143] sending the steel out, or is that an element of your overhead expenses-

A. The cost of testing and inspecting the structural steel before we receive it from the mill is included in the cost per ton that I have testified to as being \$38.00. There is no cost to have the inspecting done at our shop.

Q. Who inspects it?

A. Mr. Smedberg, paid by the architect.

Q. Who inspects it here? (Meaning at Wauke-
sha.) A. Our own men.

Q. Have you no General Manager or Superintendent who inspects it here? A. No.

Q. Do you pay the inspector in addition to the superintendent? A. Yes.

Q. And he inspects under the direction and supervision of the superintendent? A. Yes.

Q. Briefly stated, your items of costs, when you stated to your counsel that it would cost the Modern Steel Structural Company a certain sum to complete this contract, did not include any part of the over-

(Deposition of Samuel B. Harding.)

head expenses except the sum of \$694 for fuel, paint and paint brushes? Is that correct?

A. Yes; and other items are enumerated, amounting to \$694.

Q. And the reason you included those is that, while you charged them in your bookkeeping to overhead, you thought you ought to deduct them in this case? A. Yes, that is it.

Q. The drawings that you identified this morning, 31 on tracing cloth and 28 detail drawings on tracing paper; represents the entire drawing done for this work, does it not?

A. Yes, together with the list of material. [144]

Q. I mean the drawings.

A. Yes, and the material lists prepared by the draftsmen.

Q. What was the total amount of material ordered by you?

A. I cannot ascertain that. I should judge probably seven or eight hundred tons.

Q. How much material was actually delivered to you here? I mean at your works at Waukesha.

A. $161\frac{1}{4}$ tons.

Q. Was actually delivered to you? A. Yes.

Q. What became of that?

A. $39\frac{1}{4}$ tons of it was sent to San Francisco and the balance, 122 tons, we still have, or a part of it, in our yard.

Q. Did you use part of that 122 tons? A. Yes.

Q. Of whom did you purchase the $161\frac{1}{4}$ tons that were delivered here?

(Deposition of Samuel B. Harding.)

A. We bought it from four or five concerns which we had running accounts with at the time.

Q. Will you name them?

A. Jones & Lockman.

Q. How much from them?

A. I would have to figure it out.

Q. Will you do so in your deposition?

A. Yes.

Q. Will you include the names and amounts purchased from other factories? A. I will.

(Pursuant to this request and promise, the witness annexed to his deposition the following statement:)

Statement of material bought for work on contract of the American-Pacific Construction Company, as per request on page [145] 67, lines five to fifteen, inclusive:

May 4, 1907.	Cambria Steel Co.....	42022 #	cost	\$ 792.00
" 31, "	" " "	4202	"	79.21
Jan. 31, "	Jones & Laughlin Co.....	19565	"	368.80
" 26, "	" "	10690	"	200.57
Apr. 10, "	Lackawanna Steel Co.....	63900	"	1233.15
Jul. 24, "	Ill. Steel Co.....	35184	"	730.80
Mar. 29, "	" "	24092	"	454.14
" 30, "	" "	529	"	9.97
Apr. 16, "	" "	15650	"	295.00
Mar. 27, "	Eastern Steel Co.....	11800	"	229.27
	Modern Steel Structural Company			
	stock	67274	"	1278.20
Apr. 4, "	Eastern Steel Co.....	27592	"	520.11
	161¼ tons.....	322500		6191.33

It will be noticed that some of the steel cost more than \$38.00 per ton. This is explained by the fact that some of the 391¼ tons shipped west was pur-

(Deposition of Samuel B. Harding.)

chased regardless of cost so as to make early delivery.

The WITNESS.—(Continuing.) I will also annex to my deposition the exact date when the plaintiff began work under this contract, and the kind of work it did:

(This information is not furnished with the deposition.)

Q. Your overhead expense, as I understand it, is for the general management of the business of the Modern Steel Structural Company, applying to all contracts and all work being done by that company?

A. Yes, divided proportionally.

Q. But you did not charge any portion of this expense—I mean overhead expense—to the cost of discharging this contract with the American-Pacific Construction Company?

A. None other than that \$694.00.

Q. For the material that would have been used?

A. Yes.

Q. You estimated that? A. Yes.

The WITNESS.—(Continuing.) I gave \$4.80 a ton as journeymen labor because of this contract, not from my opinion, but from [146] my experience. The various items of cost which I have given, with the exception of the freight to San Francisco, and the cost to plaintiff of the unfabricated material, namely, \$38.00 a ton, are mere expressions of my opinion.

Redirect Examination by Mr. TAYLOR.

Q. When a job comes into the factory here, to the plaintiff, before any work is done in fabricating the

(Deposition of Samuel B. Harding.)

steel proper, you have to get out detail drawings, do you not? A. Yes.

Q. That was so in this case with the defendant?

A. Yes, following the work sheet.

Q. What was the capacity of this plant, per day, in getting out structural steel so required by this contract, at that time? A. 80 tons a day.

The WITNESS.—(Continuing.) Devoting the plaintiff's entire attention to this job, after the drafting was done, if it had nothing to do only that job, it could be completed inside of thirty days, but it would not have been practical but with only one-third of the shop space for this job and two-thirds for other work, it could have been completed in from sixty to ninety days. The depreciation of machinery and plant amounts to 70 cents a ton, and I allowed for wear and tear of machinery and depreciation of plant, in making up the amount of seventy cents a ton. In fabricating steel we figure that there is a depreciation on the entire plant of seventy cents per ton for every ton produced.

Q. If that is so, then that 70 cents per ton would be a legitimate credit? A. Yes.

Mr. HUMPHREY.—You include that seventy cents per ton as a part of the overhead expenses and not included in the cost?

A. Yes.

Mr. TAYLOR.—Then this is a legitimate credit.
[147]

Q. I asked you a moment ago what the average wear and tear and depreciation of plant amounted to

(Deposition of Samuel B. Harding.)

per ton of steel fabricated, and you said seventy per ton. A. Yes.

Q. Is that so?

A. Approximately so, I have never figured out items of depreciation in terms of tons; I am doing it now roughly.

Q. I asked you a moment ago what the depreciation was—what it would average per ton, for the construction of steel and your answer was seventy cents. Now, I ask you what part of that relates to the deterioration of the plant in consequence of the use of it in constructing steel, and what part of it would be depreciation, whether the plant was in operation or not.

A. I cannot answer that. The reason I answered, seventy cents a ton, was because I know our total tonnage is about so much, and referring to our records will show the depreciation of the machines used.

Recross-examination by Mr. HUMPHREY.

The WITNESS.—About one-third of the plaintiff's plant would have been used in completing this contract. Every part of the plant would not be used, the only parts that would be used were the structural shop and the drafting-room, and that is one-half of the plant. The plaintiff had agreed for the steel to be used in fulfilling this contract, but I did not testify that we entered into a particular contract for this purpose. Plaintiff had blanket contract that run for our average requirements. I haven't that contract here, but it covers a year or six months. I had contracts from January, 1907, to January, 1908,

(Deposition of Samuel B. Harding.)

whereby plaintiff received steel at \$38.00 per ton and I will annex that to my deposition, it would not have been practical for plaintiff to have devoted its entire plant to the discharge of this contract. In looking over one of my contracts I find that I bought steel in one instance at 30¢ less than \$38.00.

Q. Mr. Harding, you have never had any contract with any rolling company to furnish material for this particular job? [148]

A. No.

Q. You had blanket contracts under which you were to receive steel on the cars at Waukesha at a certain price per ton? A. Yes.

The WITNESS.—(Continuing.) I say it was practically 30¢ a ton less than \$38.00 from examining an invoice before me. A part of the material used for this particular job was purchased at that price. I shall annex to the deposition a memorandum showing the price paid or agreed to be paid for the steel.

Deposition of Henry A. Sell, for Plaintiff.

Thereupon, on behalf of plaintiff, there was read in evidence the deposition of HENRY A. SELL, a witness produced on behalf of plaintiff, said deposition having been duly taken in the City of Waukesha, State of Wisconsin, before T. W. Parkinson appointed as Commissioner to take testimony in said cause, and Mr. Sell testified as follows:

I am thirty-eight years of age. I reside at Waukesha, and am superintendent of the structural department of the Modern Steel Structural Company, and live at 416 Lincoln Avenue, Waukesha, Wiscon-

(Deposition of Henry A. Sell.)

sin. I have been connected with the Modern Steel Structural Company for eleven years, for three years of which I was shop foreman and for eight years superintendent. During the last eight years I have been superintendent of the work shop and my duties are to supervise the work, estimate the work and supervise and figure on the costs. I have charge of that department and know the cost of doing work there. I am familiar with the job known as the "Columbia Theater Job."

Q. Are you familiar with the plans and specifications and details of that job? [149]

A. Roughly; yes.

The WITNESS.—(Continuing.) From my knowledge of the workings of the shop and the cost of labor, the cost in the spring and summer of 1907 of shop labor of journeyman labor, during the work of fabricating steel, for a job like the Columbia Theater, would be about \$4.75 a ton, which included the loading and painting of the steel. That is my judgment from my experience in that line.

Cross-examination by Mr. HUMPHREY.

The WITNESS.—I arrived at that figure, \$4.75 per ton, from the cost of various similar jobs on frame buildings. \$4.75 per ton does not include my services, which consists in pushing the job right through the plant and supervising all the shop labor, until it is on the cars. In addition to my supervision, the shop foreman, and department foreman also supervise this work, and sometimes their salaries are included in the shop costs, and in this par-

(Deposition of Henry A. Sell.)

ticular case only part of those salaries were included in the shop cost, the other part being included in overhead expense. Part of the salaries of the foreman is included in this cost and part is not.

Q. Now, what part of that \$4.75 is the actual labor of fabricating that steel? A. That is all.

Q. That is all? Well, then, don't you segregate it? Do you make no segregation between the painting and the fabrication?

A. The painting is actual labor.

Q. Then do you subdivide the labor, as painting of the steel, as distinct from the fabrication?

A. We classify it.

The WITNESS.—(Continuing.) The \$4.75 would be the cost, including the painting, but does not include the paint. I make no provision in the \$4.75 a ton for the cost of shop labor, for the wear and tear, or use of the different mechanical devices, at the [150] plant. The use of the mechanical devices at the plant and the use of the tools are something over and above the shop labor that I have mentioned. In a contract like the one that we have with the American-Pacific Construction Company templets are first made; then the material is unloaded in the yard and goes to the punchers and bending machines. From there it is assembled and riveted and then goes to the rotary planer; then it is detailed and put back on the riveters. Then it is ready for inspection, painting and loading.

The WITNESS.—(Continuing.) In the item of shop costs of \$4.75 a ton I do not include the material

(Deposition of Henry A. Sell.)

that is used in making templets, just the actual work. In assembling steel mechanical devices are used; I have not included the use of them in the shop cost which I figure at \$4.75 a ton, nor do I include in the shop cost, \$4.75, the running of the riveters, nor the power. I do not include in that item of \$4.75 as a shop cost per ton the item of the cost of running the rotary planer. I do not include the power. When I talk of detail drawings I do not include the cost of material. After the work is milled, we detail them, put the rivets in, but I do not include in the \$4.75 the cost of making the rivets.

Q. You say that in detailing them you rivet them together and put the angle-irons on. You don't include in the cost of the material of the angle-irons and of the rivets? A. No, sir.

Q. By whom was the inspection done?

A. It was always done by our own men, and if the contract calls for an engineer's man, it is done by him also.

Q. Who does it? A. We have an inspector.

Q. Does he come under the head of your overhead expenses?

A. He was part of the shop labor at that time.

Q. What runs the rotary planer? [151]

A. Electric power.

Q. You don't include that? A. No, sir.

Q. Nor the use of that rotary planer?

A. No, sir.

Redirect Examination by Mr. TAYLOR.

The WITNESS.—The rivets and angle-irons that

(Deposition of Henry A. Sell.)

are used, after the material is fabricated, goes into the weight, but we take the rivets no more into account than we take other metal; after the material is fabricated, it all goes on the scales and is added to the complete tonnage. When I gave \$4.75 per ton as the price of shop labor per ton for doing a job like the Columbia Theater building in San Francisco, I had reference to the early part of the year, 1907.

Deposition of Frederick Hoffman, for Plaintiff.

Thereupon, on behalf of plaintiff, there was read in evidence the deposition of FREDERICK HOFFMAN, a witness produced on behalf of plaintiff, said deposition having been duly taken in the City of Waukesha, State of Wisconsin, before T. W. Parkinson, appointed as a Commissioner to take testimony in said cause:

Mr. Hoffman testified as follows:

My name is Frederick Hoffman. I am forty-one years of age, and am a structural engineer by occupation. I reside at 220 Broadway, Waukesha, Wisconsin. I have been a structural engineer for five or six years past. I was educated in a technical school in Germany, and am now employed by the Modern Steel Structural Company of Waukesha, Wisconsin, where I have been employed between nine and ten years past. When I was first employed by that company, I was shop inspector, and for the last five or six years I have been structural engineer, and my duties in that capacity consist of making general plans of structural steel structures; making detail

(Deposition of Frederick Hoffman.)

plans; writing up specifications, and perhaps, [152] occasionally checking detail plans for the company. To a certain extent I am familiar with the plans and specifications for the Columbia Theater job at San Francisco, which came into the shop of the plaintiff early in January, 1907. At that time I knew, from the plans and specifications, the length, width and height of the building, and generally in regard to its dimensions. I had nothing to do with the making of the detail drawings.

Q. From your examination of the drawings and specifications of the building, in your judgment, what quantity of structural steel was required to carry out the plans and specifications for the Columbia Theater Building in question.

Mr. HUMPHREY.—I object to that question as it calls for opinion evidence.

The objection was overruled and exception taken, which exception defendant hereby designates as its exception No. 8.

(Exception No. 8.)

A. In my judgment, it would take in the neighborhood of 1500 tons.

The WITNESS.—(Continuing.) That would be a fair estimate; I arrived at approximately 1500 tons of structural steel by my past experience, considering buildings of similar construction and size, and considering the plans and specifications and the City Ordinances of San Francisco, covering such buildings at that time. I had before me the City Ord-

(Deposition of Frederick Hoffman.)

nances and specifications. I have no interest in this litigation.

Rivets are used in riveting metal together and the angle-irons become a part of the material that is weighed before the metal is sent.

Q. What is called the angle-iron comes from the rolling mills as angle-iron at the same price as anything else? A. Yes.

Q. And rivets—they come to about the same price? [153]

A. I cannot say about that. Generally, riveting steel is somewhat less—less than the other.

Cross-examination by Mr. HUMPHREY.

The WITNESS.—I did not take off the quantities from the plans of the Columbia Theater building. I said it would take 1500 tons of steel because I just estimated that on past experience with other buildings and passed my judgment on the specifications and what they called for. It was only an estimate.

Q. What do you mean by saying that the rivets would be cheaper?

A. The riveting steel. We manufacture that ourselves.

Q. You are not talking about the cost of finished rivets? A. No.

Q. How about the angle-irons?

A. They come at certain lengths, not punched.

Q. And you make it into proper length and do the punching? A. Yes, sir.

Deposition of Thomas Vigus, for Plaintiff.

Thereupon, in behalf of plaintiff, there was read in evidence the deposition of THOMAS VIGUS, a witness produced on behalf of plaintiff, said deposition having been duly taken in the City of Los Angeles, State of California, before E. H. Owens, appointed as a Commissioner to take testimony in said cause.

Mr. Vigus testified as follows:

My name is Thomas Vigus. I am 50 years of age. I reside at Los Angeles, and am engaged in the oil and building material business. I was connected with the American-Pacific Construction Company of San Francisco during part of the year 1906 and part of 1907, as General Manager. I think that my employment began in the fall of 1906, and ended in the fall of 1907. I was also a director of that Company during part of that time. I have a resolution [154] that was adopted by the Board of Directors of the American-Pacific Construction Company, which is certified to by the Secretary of that Company to be correct. The resolution and certification by the Secretary is as follows:

“RESOLVED by the Board of Directors of the American-Pacific Construction Company, at a meeting held duly called that Thomas Vigus, the general manager of the American-Pacific Construction Company, be, and he is hereby, fully authorized and empowered to make and enter into, in the name and on behalf of the American-Pacific Construction Company, all contracts relating to or in pursuance of the purposes for which the said corporation was organized.

(Deposition of Thomas Vigus.)

I hereby certify that the above and foregoing resolution was duly and regularly adopted at a meeting of the Board of Directors of the American-Pacific Construction Company held in the City and County of San Francisco the 17th day of October, 1906. (Signed) William F. Humphrey, Secretary."

(It was here admitted by counsel that the signature of William F. Humphrey, attached to the certificate was correct, and that at that time he was Secretary of the American-Pacific Construction Company.)

The WITNESS.—(Continuing.) My duties as General Manager of the American-Pacific Construction Company were to transact its general business. As General Manager of the American-Pacific Construction Company I made contracts on its behalf, signed the same, "Per Thomas Vigus, General Manager," and these contracts were acted upon and carried out.

Approximately the amount of business done by the company during the period I acted as General Manager would be in the neighborhood of a million dollars. I, as General Manager of the American-Pacific Construction Company, accepted the proposition of plaintiff. After the contract referred to in plaintiff's amended complaint was entered into, the plaintiff furnished steel and the American-Pacific Construction Company, as far as I know, paid [155] for it; as far as I remember, the American-Pacific Construction Company paid for it.

(Deposition of Thomas Vigus.)

Cross-examination.

(By Mr. HUMPHREY.)

Q. Mr. Vigus, reference has been made in the direct examination to proposals for the Columbia Theatre building, which proposals were stated in the question to have been made by the Modern Steel Structural Company, by the plaintiff. Did you ever take up such proposals with the board of directors, or did the board of directors of the American-Pacific Construction Company act on any proposals at all with reference to the Columbia Theater building?

A. They did not.

Q. You stated, Mr. Vigus, that you received some proposal from the Modern Steel Structural Company whereby it would furnish the American-Pacific Construction Company steel for the Columbia Theater Building, so-called, at \$77 per ton. Now, did you, at that time, have any conversation with any of the officers of the Modern Steel Structural Company with reference to the price named? A. I did.

Q. With whom did you have that conversation?

Mr. TAYLOR.—Wait one moment. I object to the last question as incompetent, irrelevant and immaterial; and as calling for evidence which might tend to vary or contradict the terms of a written contract; where a written contract is made, all the previous colloquy is supposed to be merged into the contract.

The objection was sustained and exception taken, which exception defendant designates as its exception No. 9.

(Exception No. 9.)

(It was here admitted that the conversation which plaintiff tried to elicit from the witness was a conversation had by the witness with Mr. S. B. Harding, the President of the plaintiff Company.) [156]

Testimony of F. W. Harding, for Plaintiff.

F. W. HARDING, being duly sworn as a witness on behalf of plaintiff, testified as follows:

My name is F. W. Harding. I am 41 years of age. My residence is Waukesha, Wisconsin, and I am Vice-president of the Modern Steel Structural Company of Waukesha, which office I have held for the past three months. Prior to that time I was Treasurer of the Company for five or six years. I believe I was elected Treasurer in 1907, at which time I was also directing Manager and one of the Board of Directors.

I am familiar with the contract that existed between the Modern Steel Structural Company and the American-Pacific Construction Company, and examined it critically and carefully the specifications and plans for the building in question known as the Columbia Theatre, and I can state very approximately that at least 1,500 tons of steel would have been required to construct that building.

I have done a great deal in behalf of my company in taking contracts, although it never became part of my duty to remember quantities, but I was required to place valuations on work. The estimating of quantities would be done by our clerical force. I am familiar with this contract, and I am able to state that after the contract was executed by the

(Testimony of F. W. Harding.)

defendant what plaintiff did to carry it out. It first prepared the part of the detail drawings for use in the shop. We prepared a certain number of detail drawings. Next, we prepared templates, a certain number of templates. Templates are the wood patterns laid out from the detail drawings used in the shop for marking up the work, riveting it, punching it and assembling it. We proceeded to fabricate. By that term we mean unload the steel from the cars, to lay it out by these templates and next it goes under the punching machine. [157] There is coping and cutting, too, in order that the work shall fit. Then the work is riveted together, and then it is painted, and finally inspected, and loaded on the cars.

We made 31 sheets of detail drawings, 28 of which we call beam sheets, which are also detailed drawings. The papers you hand me, and which are the drawings annexed to the deposition of S. H. Harding, the President of the company, are the detailed drawings that were prepared. There are 31 of them. From a general drawing of a job, the length of the material are given and the height of the floors and general measurements but in these general drawings these are not given, small details, brackets and the number of rivets. These detailed drawings are prepared for shop use, so that the workmen in the shop know every bit of work that is to be done on them.

The column for this building varied from 21 feet in the first story to a lesser height on the top story. All of these 31 detail drawings relate to the job in question. After we made such drawings as this, we

(Testimony of F. W. Harding.)

draw off the number of pieces and lengths and sizes on these forms and a copy is mailed to the rolling mill from which they ship us the steel required for the job. That steel comes cut to length.

Mr. TAYLOR.—Q. Will you state whether or not by the 1st of April, 1907, an adequate quantity of steel had been ordered and contracted for that you might order as you wanted it from the different rolling mills for this job?

A. Such had been ordered, as it so appears from the drawings that had been prepared. We had blanket contracts for steel that lasted for the first six months of 1907, with Jones & Laughlin, Eastern Steel Company, Cambria Steel Company, and I am sure at least two or three others. The cost per ton of steel that could be ordered for the first six months of 1907 did not exceed \$38 a ton. Some was lower. Plaintiff fabricated and shipped under its contract prior to April, 1907, 391¼ tons of steel, but we did [158] not get out the rest, because we were instructed by the American-Pacific Construction Company to stop all work on this contract. According to my best judgment, it would cost \$4.80 a ton for shop labor to have fabricated remaining 1460¾ tons. My knowledge of the cost of fabrication is gained by experience because we keep honest records of all our contracts that pass through the shop. It is my business to know the value of work, because I am continually doing business and placing valuations on work. I have been in the business altogether for eleven or twelve years. The total cost of fabricating

(Testimony of F. W. Harding.)

so far as shop labor was concerned, 1460 $\frac{3}{4}$ tons that remained to be furnished when the work was stopped would be \$6,871. There was some drafting remaining to be done. This drafting was worth 90 cents a ton, getting up the detailed drawings, for the labor alone, and to complete all of the drafting for this job would have cost \$680. We were using graphite paint. The paint for the remaining number of tons would not have exceeded \$375, and the power and coal would not have exceeded \$160, and the cost of fuel oil to complete the job would not have exceeded \$75, and the wear and tear on the machinery for getting out the balance of the work would be not more than \$150 to \$160. I arrived at that figure by taking our plant and machinery depreciation and dividing it for that particular part of the work. It would have required also about 1200 additional feet of lumber to get out the balance of the templates. The value of that would have been \$28 a thousand or \$32. The paper to have completed the drafting would amount to about \$2 or \$3; and the ink for tracing the drawings would amount to \$2.50 or \$3.00, and there would have been blue-print paper, that would be worth about \$6 or \$7. The freight on 1460 $\frac{3}{4}$ tons to San Francisco was \$15 per ton; and that was the rate at all times during the first half of 1907.

Q. So that in not carrying out the contract you are saved the cost of this material for 1460 $\frac{3}{4}$ tons; you are saved the labor [159] of fabricating it; and you are saved the draughting and these other little items that you have spoken of? A. Yes.

(Testimony of F. W. Harding.)

Q. Are you able to state how much they all aggregate? A. The entire saving?

Q. Sir?

A. The entire saving by not going through with the contract?

Q. Yes. A. Not exceeding \$30,000.

Q. What, the saving, I say. How much was the saving?

A. Between \$29,000 and \$30,000. \$29,600, I believe is the exact amount I figure. The items are on that paper I have given you.

Q. The items that you have given me, and which you figured up carefully, are on this piece of paper, if you cannot carry them in your mind. A. Yes.

Q. If there is no objection, I would like you to tell me just what these items are, the items of cost.

A. To have completed the drawings would have cost \$680.72.

Q. How much is the aggregate?

A. The freight, I did not testify to, but the amount would be \$29,911 that we would have saved. We saved on the purchase of steel, \$55,508. In the matter of small items like paint and coal, fuel oil, paint brushes, punches and additional sheets of tracing cloth, ink and blue-prints and template lumber, depreciation of machines, a total of \$890.92, and to have completed the shop labor would have cost \$6,871 or the entire price cost to us would have been \$85,862.75. Our sale price of the job was \$115,500, showing a difference of \$29,637.

The WITNESS.—(Continuing.) We have over-

(Testimony of F. W. Harding.)

head expenses, salaries that we pay to the heads of departments who are employed by the month, and our different officers, who are also employed and paid by the month, and whether this job was in the shop or [160] not, it would not have made any difference with regard to those expenses as we keep our organization together anyway. I am positive I have given everything, every item of cost, that would go into the fabrication of this steel.

Q. Now, I show you a contract dated the 4th day of January, 1907, purporting to be signed by your company and also signed by the defendant. Kindly look at that contract and see if you recognize it.

A. That is the contract under which we were to execute this work, I recognize it as being the one.

Q. Will you look at the second page where the price was written in "\$77 per ton" and scratched out? You notice that? A. Yes.

Q. There was written in something else, wasn't there? It was written in "77," afterwards changed to "75," and then changed back again to "77" dollars per ton. A. Yes.

The WITNESS.—(Continuing.) When this contract was executed by the plaintiff, and forwarded to the defendant, it was written "\$77 per ton." I identify the letter dated Waukesha, Wisconsin, January 25th, 1907, as having been signed by us and sent to the defendant.

The letter was thereupon offered and admitted in evidence and marked "Plaintiff's Exhibit No. 1," and is in the words and figures as follows:

[Plaintiff's Exhibit No. 1—Letter Dated January 25, 1907, Modern Steel Structural Co. to American-Pacific Construction Co.]

“Waukesha, Wis., Jan. 25, 1907.

Amer. Pac. Cons. Co.,

San Francisco, Calif.

THEATER CONTRACT.

Gentlemen:

We have your of Jan. 19th enclosing copy of contract with prices changed. Now, this is not the understanding at all. You will remember the night the writer made out the pencil form, he said that the work was worth \$77.00 and we discussed where you could get the other \$2.00 above the \$75.00. [161]

Now, if you can buy this job one cent cheaper anywhere, we will be very much pleased to relieve you from the obligation to us. We must have our price, as we know the value of this kind of work. What some other building has cost is no criterion to go by. The question is, what this particular building can be bought for.

It develops that we have got to do much more work on the plans as per our letters of yesterday. We have prepared ourselves to do the fair thing and assumed the burden of doing this extra work on the plans, which we are not obligated in the least to do, but are doing to help you and your customer out. We have much more of that kind of work than we can do and should not have assumed it at all. Now, to have you come back and change the price, after our understanding and after we have gotten started

into the job and having put ourselves into the breach to help out all of the conditions, we are not a bit pleased at the prospects. Therefore, on receipt of this letter, we ask that you wire us instructions, and confirm same by letter, to change the price back to \$77.00, and as well, protect us in the additional drawing work that we have to perform, which was not contemplated when we gave you the price. It may amount to \$300.00 or \$400.00, we should say, at the outside, but it all counts; especially when we are so busy.

If you desire to buy the job elsewhere and not give the \$77.00, we would be very much pleased to release you, only asking you to pay for what we have already done.

Mr. Smedberg has approved a few drawings, the material off from which will go to make up the first carload. We have not started fabrication on the work, as these drawings were just approved yesterday, and we will await your telegram before proceeding to manufacture the steel.

Very truly,

MODERN STEEL STRUCTURAL CO.

S. B. H.

By S. B. HARDING." [162]

(Written in pencil:) "You will remember that some stock material was required at a greater expense which you told Mr. Smedberg yourself that we were asking two dollars more per ton for as effecting the tonnage price."

The witness here identifies a telegram, which he stated was received in response to the above letter.

The telegram was dated San Francisco, Cali., Jan.

(Testimony of F. W. Harding.)

29, and was offered and admitted in evidence and marked "Plaintiff's Exhibit No. 2" at the trial, and is in the words and figures as follows:

Plaintiff's Exhibit No. 2, Telegram Dated January 29, 1907, American-Pacific Construction Co. to Modern Steel Structural Co.]

"San Francisco, Cali., Jan. 29, 1907.

Your letter received. Will pay \$77.00, confirming it by letter. Rush the work.

1:45 P. M.

AMER. PAC. CONS. CO."

The WITNESS.—(Continuing.) When I received back that contract it was changed to \$75, and when it was changed back on authority of that telegram, to \$77. It was at \$77 per ton that we undertook the work.

Thereupon plaintiff offered and had admitted in evidence the alleged contract produced by defendant at plaintiff's request, with the changes in ink, as testified by the witness, and said contract was marked "Plaintiff's Exhibit No. 3" at the trial, and is in the words and figures as follows, to wit:

[Plaintiff's Exhibit No. 3, Proposal Dated January 4, 1907, from Modern Steel Structural Co. to American-Pacific Construction Co.]

"PROPOSAL FROM MODERN STEEL STRUCTURAL CO.

Waukesha, Wis., Jan. 4, 1907.

American-Pacific Construction Co. San Francisco, Cali.

We propose to furnish you in good order the fol-

lowing described structural material, constructed in a workmanlike manner, described as follows and in accordance with the drawings furnished by Jos. D. Smedberg and specifications also furnished by J. D. Smedberg, identified with marks: 'Copy #1,' Initialed, 'S. B. H. 12/30/06,' excepting as noted under 'REMARKS' on sheet #2 attached.

Namely, the structural steel and iron (except the grillage beams, bolts, separators and column bases mentioned on page 3 of [163] specifications referred to above) for the Richelieu Realty Syndicate Theatre and Office Building, known as the Columbia Theatre; Location—southeast corner of Van Ness & Geary St., San Francisco, Cali.

Delivery: as follows: That portion indicated by Mr. Smedberg, shown within red lines on blue prints 3-S, 4-S, 7-S dated by us on back of print as received Dec. 31, 1906, and 8-S dated by us on back of print as received Jan. 3, 1907, required to begin erection of steel work on stores to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg.

Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg.

REMARKS: Our proposition is based on the substitution in part (as referring to 'KIND, CHARACTER AND FINISH OF MATERIALS,' beginning page 9, and 'INSPECTION' beginning page 11 of the above specifications) of Manufacturers' Standard Specifications as found in Carnegie's Hand Book.

Mill Test Reports, within said specifications are proposed, as being satisfactory in the above respects to Mr. Smedberg, and upon his request stating upon which portions of the work he will require such reports, we will comply therewith by furnishing same.

We also agree that the tonnage is to be determined and paid for by certificates from the Western Weighing Association, at the point of shipment. It is understood that the AMERICAN PACIFIC CONSTRUCTION COMPANY, at their own expense, will weigh same at the Public Scales in San Francisco, and should they prove that the weights so certified by the Western Weighing Association at point of shipment are not correct, we hereby agree to reimburse the AMERICAN PACIFIC CONSTRUCTION COMPANY, the amount overpaid us.

Price to be Seventy-seven dollars (\$77.00) per ton; Freight [164] allowed to San Francisco, Cali. Correct figured weights of steel to govern amount of sale and all steel work to be accepted at our works by Mr. Smedberg, or his authorized agent.

Terms of payment as follows: 30 days net cash from date of invoices.

Payable in New York, Chicago or Milwaukee Exchange, free of Expense to us for the collection charges.

We are responsible for shop errors in work not erected by ourselves and for alterations whether erected by ourselves or not, only when notified of same in writing before correction is made and given an opportunity and reasonable time to suggest remedy or to ourselves make alterations.

When delays are caused to our men by material or labor not furnished by us, you agree to pay their time, at our regular rates, and their expenses, while so delayed.

This contract is contingent upon our ability to procure material from the mills, delays of carriers and upon strikes, accidents or other delays unavoidable or beyond our reasonable control.

It is expressly agreed that there are no promises, agreements or understandings outside of this contract and that no agent or salesman has any authority to obligate the MODERN STEEL STRUCTURAL COMPANY, by any terms, stipulations or conditions not herein expressed.

The title and right of possession to all material we furnish remains with the MODERN STEEL COMPANY until the same has been fully paid for in Cash.

This proposition is for immediate acceptance, but although accepted does not constitute a contract until approved by an executive officer of the Modern Steel Structural Company, and is subject to change or withdrawal until so approved.

In case any difference of opinion shall arise between the [165] parties to this contract in relation to the contract, the work to be or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract, and these two shall have the power to name an uninterested umpire

(Testimony of F. W. Harding.)

whose decision shall be binding on all parties to the contract.

Ship Via:

MODERN STEEL STRUCTURAL CO.,
Accepted Jany. 17th, 1907, By S.B.H.

Approved by S. B. HARDING, Pres.
AMERICAN-PACIFIC CONSTRUCTION CO.
THOMAS VIGUS,
General Manager."

Mr. HUMPHREY.—Of course, I do not yield that this is a contract. Otherwise, we make no objection.

Mr. TAYLOR.—This is the same as the copy.

Mr. HUMPHREY.—It is not the same as the copy.

Mr. TAYLOR.—I thought it was. Then I had better read it.

Cross-examination.

The WITNESS.—The letter you hand me, dated January 31, 1907, is in acknowledgment of the telegram that has been offered in evidence as Plaintiff's Exhibit No. 2 at the trial. It is signed by the Modern Steel Structural Company by S. B. Harding, my brother.

Thereupon it was offered and admitted in evidence and marked "Defendant's Exhibit 'A' at the trial," and is in the words and figures as follows:

[Defendant's Exhibit "A"—Letter Dated January 31, 1907, Modern Steel Structural Co. to American-Pacific Construction Co.]

(Letter-head Modern Steel Structural Co.)

"Waukesha, Wis., Jan. 31, 1907.

Amer.-Pac. Construction Co.,

San Francisco, Calif.

Gentlemen:—

We have your wire of Jan. 30th regarding expiration of Mr. Smedberg's services and wired you as follows: 'Cannot give you complete point of view by wire. Writing.'

We also acknowledge receipt of your wire of Jan. 29th reading as follows: 'Your letter received. Will pay \$77.00, confirming it by letter. Rush the work,' for which we thank you.

We do not know whether to fear any complications through the service of Mr. Smedberg, or not. While he has not been particularly objectionable to us regarding the approval of plans, we somehow feel that there is a hereafter coming. Following is the position that he takes: and we fear that similar things will lead to trouble in the end, if he is working out any well-defined plans. It may be that he is just foolish in these attempts.

When you and the writer were talking about the price, at your office, you will remember calling him in and telling him that we were asking more than our quotations, because, for one reason, there was to be some portion of it taken from stock.

Now, your contract calls for the delivery of steel

to start construction of the stores, (or to that effect) within 30 days from the approval of working drawings. It does not say to complete steel for the stores, and we therefore proceeded to get out what would be about two cars, which the writer understood would be complying with the agreement. It now develops that Mr. Smedberg expects the whole stores completed under this 30-day time and gives as his reason that, if he succeeds in getting that material shipped within the said 30 days, he is to receive some compensation for so doing, as the rentals for that portion will come in earlier to [167] the owners. You can readily see how he would be influenced in this matter.

Now, your contract does not call for the completion of any one portion by a certain time. It is the writer's idea that we were simply to make a showing to prove that there was such a thing as steel back east. Please state what your pleasure is in this matter.

When our contract was received from you with the price changed the writer asked Mr. Smedberg if he remembered hearing the conversation above referred to. He admitted that he did and the writer said to him that we regretted that there was any misunderstanding between yourself and the writer, as we felt in the whole transaction that we were more carrying out the obligation made by G. W. Harding of Los Angeles than anything else, as we were so filled up with work and the writer further said that we would be pleased if we could sublet it to someone and get out even and at the same time serve

you, but if we could not, we were going to stick by and fill the order. Evidently, he immediately saw an opportunity to make another commission, which his hand is apparently out for all the time. He said that he could take the plans and go to Chicago and get it shipped much quicker from some of his friends (the Illinois Steel Co.), and make something for us out of it and also for himself, as he could secure a lower price, he was sure. The writer answered him by saying that we did not need any of that kind of help because we had taken work back and forth a number of times with this same Co. and would attend to that part of it ourselves.

We write the Illinois Steel Co. an inquiry, copy of which is as follows:

‘We have a store and theater contract for San Francisco and desire to buy the fabricated steel f. o. b. Chicago. It consists of column and beam construction and some roof trusses over the [168] theater, probably 1300 to 1500 tons in all. We are getting out a few pieces promptly, and on the balance we should have 60 to 90 days shipment from the approval of the drawings by the architect’s engineer. Inasmuch as we have all of the plans and some of the detail drawings under way and desire to sublet the work promptly, we wish that you would send a representative to carefully examine the class of work. Preferably, a man who can quote prices and delivery.’

We received a quotation from the Ill. Steel Co., copy of which is as follows:

‘Answering your letter of Jan. 29th, we propose

to furnish the structural material for Columbia Theater Bldg., to be erected in San Fran. as follows:

Beam work (all work not included under trusses and columns)	\$2.55 per 100#
Columns	\$2.85 “ “
Trusses	\$3.15 “ “

Prices quoted are f. o. b. cars Chicago and include one coat of Ill. Co's paint (color and quality to be designated by you) in shop before shipment and are based on the following:

Material and workmanship to be in accordance with manufacturer's standard specifications.

Material to be taken from our stock—ultimate strength 55000# to 65000# for shapes and plates; 48000# to 58000# for rivet steel.

Seven complete sets of blueprints of the shop detail drawings and one complete set of the architect's general drawings to be furnished us free of charge.

Substitution to be made for material, specified on drawings, which we do not have in stock, unless it is possible to get such material from the mill in time to make the shipment specified.

We can make complete shipment in 60 or 90 days following receipt of approved shop detail drawings, subject to prior sales of material and delays due to causes beyond our control.' [169]

This question, you will notice, does not include the drawings and is indefinite as regards delivery, therefore, leaving a very small margin in our price, after making the drawings and taking the responsibility for prompt delivery on a part and a short delivery on the balance.

Between the time our inquiry was sent and the quotation was received, you will see that two or three days time elapsed, during which there was some phone conversation between us and Mr. Brunner, who signed the quotation, to the effect that Mr. Smedberg had not complied with the writer's request, but had actually gone to the Ill. Steel Co. with the plans, and they in turn phoned us, suspicioning the sincerity of the man, asking us what we had to do with it, as he seemed to be trying to work for so many interests in the matter; also telling us that they had advised him by wire a day later that they could not get out the work at all. After this, Mr. Smedberg seemed to be ashamed, as he makes very few advances to any of us.

Before receiving the quotation above referred to, Mr. Brunner again called up and advised us that he had a telegram or letter from Mr. Smedberg stating that if we bought the steel from the Ill. Steel Co. he would reject every piece of it. Mr. Brunner has promised to send us a copy of this instrument, but it is not here at this writing. Mr. Brunner at the same time telling us over the phone that the quotation, which they were then compiling, they would make with the understanding that Mr. Smedberg would be discharged from any service in connection with it, as they would not agree to get out the work and have him associated with it in any way.

So far as things go at our office, everything is pleasant, but we fear something will develop later, as the fellow really does not seem to be in his right mind in trying to carry on so many projects.

Now, we do not need Mr. Smedberg to approve any drawings or inspect any work, as if we were entrusted with this responsibility [170] ourselves, it would be human to feel like giving better value, as we would be trusted and not be watched. But we do not just see at this time how we can dispense with his services, or the architect's, in telling us where the partitions come, and what the internal and external arrangement of the bldg. will be, as you understand, this is not all settled yet. We could, if the architect knew what he wanted from foundation to garret in this bldg., get along with instruction by mail from him, which would not be very extensive and we could get the bldg. out from this point on without any help whatever from our friend, as he puts in very little time anyway, and practically no work.

Reading your wire of Jan. 30th we did not see how we could put the above into a few words, yet, we hesitated in not replying to your request, feeling that you had some reason of your own for wanting to know just this. So in the light of the above and answering you as to when we can dispense with Mr. Smedberg's services, would say 'At once, if the architect will tell us what he tells Mr. Smedberg in connection with what to do in the arrangement of this bldg. as he certainly had to do it at present.'

We do not need a guardian, or some one to tell us how to build a steel structure, so you may do in this matter as you see fit. However, we are trusting you to handle it properly, yet we fear somehow, that when we get a lot of money tied up in material, that

(Testimony of F. W. Harding.)

our friend will become exacting and cause us some unnecessary expense, judging from the above action and the suspicion which the writer has made you acquainted with by his letter written on the train coming east from your office.

Yours truly,

MODERN STEEL STRUCTURAL CO.

S. B. H. By S. B. HARDING." [171]

The WITNESS.—I estimated that 1500 tons of steel would be required for the building, but I could not take the quantities to determine that. I had to take the cubic foot rule, because the general drawings were not completed for the entire building, but we knew the size of the building. The building was a combination of both office and theater building,—a combination of both. There were some store buildings in the bottom, or in the first story, and then came the theater portion of which there was quite a lot of open space where the theater portion was, and above that, and I think partly on the sides, was more or less office construction. That is in a general way, as I remember it. This building was to be constructed on the southeast corner of Geary, and Van Ness, but was never built. Another building has been erected there at the present time, but this building was not built by any of the parties to this action.

The papers that are annexed to the deposition of S. B. Harding are all of the detail drawings and are all of the drawings that were prepared by the plaintiff, and the 31 and 28 sheets of drawings that have

(Testimony of F. W. Harding.)

been offered in evidence, and which were annexed to the deposition of S. B. Harding, are only for the first part, that is, the stores and first and second story columns and some of the connecting beams. They more or less refer to the office building proper and none of the truss work for the theater had been done.

The cost of fabricating steel for a theater is more than the plain beam work of an office building. The theater portion of that whole building, where you might term that part of the work as being more difficult than the other, would not be more than five per cent of the total weight of the building. It would only be a small factor in the cost of the building.

Q. What tonnage did the papers there (referring to the detail drawings which the witness had identified), which you have referred to give?

A. I could not answer absolutely. There was 78,000 [172] pounds of material that was shipped. We were progressing right along with the contract and some of these drawings refer to work that was yet to go forward. I have not examined the drawings to ascertain the amount of the tonnage they gave.

Q. You stated that you had a cost sheet showing the amount of labor on each particular portion of the work, that was done, on each contract that came into your possession. There is no such sheet annexed to the deposition. I hand you this and ask you if that is not a copy of the detailed cost sheet of your work for the 39 $\frac{1}{4}$ tons?

(Testimony of F. W. Harding.)

A. No, sir; I should say not. It includes all the work.

Q. What other work besides the 391 $\frac{1}{4}$ tons?

A. It includes all the work done on this contract up to a certain date. It includes some draughting, office labor and shop labor and freight charges not solely relating to the 391 $\frac{1}{4}$ tons.

“There is nothing that I see that sets out the work but I know by our general methods of cost keeping that the records of all the work of every nature on the contract would go into the office and naturally this would be the record of this contract and all that we did up to that date.”

Q. Is that a copy of your ledger showing the work done, the drawing labor, the fabrication, or rather, the shop cost? A. It seems to be.

Q. Is there any question about that being a copy of the page from your ledger?

A. No, there is no question.

Q. And the page of the ledger that refers to this contract, the contract with the American-Pacific Construction Company? A. Yes.

Q. When you receive a contract you give it a number? A. Yes.

Q. What is the number of the American-Pacific Contract? A. 561.

Q. That is a record of the work done under that contract?

A. Yes. I can go further. There was \$669 drawing labor, and here [173] is \$328. shop labor.

Thereupon was offered and admitted in evidence and marked Defendant's Exhibit "B" at the trial, "the paper identified by the witness as a copy of the ledger sheet of his book, showing the contract with the American-Pacific Construction Company and the work done under it, which is in the words and figures as follows: [174]

[illegible]

(Testimony of F. W. Harding.)

Q. Mr. Harding, directing your attention to the figures "plus 15 per cent dry," what did they mean?

A. That is the 15% that we add to the bare drawing labor to cover the fixed charges in that department, which is the salary of the superintendent of the drawing labor department. That would be one of the fixed charges.

Q. I direct your attention to the figures "plus 60 per cent"; what do they mean?

A. That would be the overhead or fixed charges based on the shop labor.

Q. Do you add that to shop labor?

A. Do we add that to shop labor?

Q. Is that to be added to shop labor? You take the shop labor as a basis from which you obtain the 60 per cent?

A. We take the shop labor as a basis.

Q. I call your attention to this: "15 per cent." What is that?

A. That is for office expenses and soliciting. That takes care of the sales department.

Q. I believe you testified that all of the paper drawings were here, and still you fabricated 391¼ tons and sent it to San Francisco?

A. Sent it to San Francisco.

Q. On the 1st of March, 1907? A. Yes.

The WITNESS. — (Continuing.) We ordered seven or eight hundred tons of steel for this particular contract.

I am quite sure that we have additional contracts to those two that are annexed to the deposition of

(Testimony of F. W. Harding.)

S. B. Harding. "We are doing business with four or five concerns at least." The plaintiff had no contracts covering this particular job with the American-Pacific Construction Company. But we had blanket contracts covering this and other jobs.

Q. I call your attention to one of the contracts here with Jones [176] & Laughlin made by the Modern Steel Structural Company on October 1st, 1906. (Referring to one of the contracts annexed to the deposition of S. B. Harding.) A. Yes.

The WITNESS.—(Continuing.) That contract, as well as the other contract annexed to the deposition of S. B. Harding with the Illinois Steel Company, dated December 4, 1906, were prior to the date on which the contract was made by plaintiff with the American-Pacific Construction Company, and are for contracts to cover purchase of any steel that the plaintiff might have required subsequent to that date. These and similar contracts are the only contracts that we have at this time.

At the time that the plaintiff made the contract with the American-Pacific Construction Company, it was doing other work, but it is possible to determine very approximately the amount of coal or fuel that would be used on any particular job; for instance, we have a coal bill for a year. Our capacity is so many tons a year. Divide the coal bill for the year by the number of tons in a certain contract, and that would give the coal. We averaged the cost per ton, and that is the method by which I arrive at that figure. And in the same manner, I determine the

(Testimony of F. W. Harding.)

value of the paint, as we know the spreading qualities of paint; one-third of a gallon would cover a ton of structural steel and the price of graphite paint per gallon is about 40 cents; we make it ourselves; that is, in some instances; it just depends. I do not know if we made it in this particular instance. My estimate of shop cost is based on actual money plaintiff paid for labor and the drawings cost is also the actual money paid for labor for preparing drawings. And in estimating the future drawings cost I have figured simply the actual cost that plaintiff would have to have paid for those drawings. [177]

Thereupon defendant offered in evidence a letter addressed to the Modern Steel Structural Company, dated September 25th, 1907, and signed by Lent and Humphrey, which was the letter to which the reply identified by the witness had been received.

This letter was admitted in evidence and marked Defendant's Exhibit "C," and is in the words and figures as follows:

[Defendant's Exhibit "C"—Letter Dated September 25, 1907, Lent & Humphrey to Modern Steel Structural Co.]

“September 25th, 1907.

Attention Mr. R. H. Simpson.

Modern Steel Structural Company,

Waukesha, Wisconsin.

Dear Sirs:—

Replying to your letter of the 21st inst. we beg to advise you that Mr. Thomas Vigus is no longer connected with the American-Pacific Construction Com-

pany, and the matter of that Company's claim against the Richelieu Realty Syndicate with whom it had the contract for erecting the Columbia Theatre building, has been turned over to us by the American-Pacific Construction Company for our attention.

We desire to have from you an exact and detailed statement of all steel actually furnished and fabricated for that contract, and the total amount of your claim against the American-Pacific Construction Company on account of its contract with your Company for that work.

We have a copy of your letter of May 28th, 1907, in which you fix the cancellation price of that contract at \$30,230. Included in that are the items:

Shop drawing.....\$ 1441.53

Unused shop space lying idle.....20183.24

which are disputed and will probably be repudiated by the Richelieu Realty Syndicate. As it must reimburse us for *for* any outlay we may have, we must be controlled by its action.

The officials of the American-Pacific Construction Company believe the objection of the Richelieu Realty Syndicate to the [178] items mentioned are well founded, and this letter must not be taken as any acknowledgment of any liability, but on the contrary must be considered, until final adjustment is made between you and the American-Pacific Construction Company, as a denial and repudiation of any liability to you.

The American-Pacific Construction Company is in a position to discount all claims and to furnish you with a New York draft for the amount required by

your letter of the 21st inst., and therefore the note annexed thereto is not signed and returned to you, but before it recognizes the claim or makes any payments we would ask you to furnish a detailed statement of whatever you may claim to be due on account of that contract and we shall take the matter up and shall pay any part of the claim that the Company recognizes as being due.

The present policy of the American-Pacific Construction Company is to discount all bills and not await their maturity. Please understand that this letter is not written in any spirit of hostility, but for the purpose of informing ourselves of the details of this transaction in order that we may advise the American-Pacific Construction Company of its obligations, if any, to you and the position it should take with the Richelieu Realty Syndicate.

Thanking you for the attention you may give this letter, we are,

Yours very truly,

W. F. H./N. LENT & HUMPHREY."

Defendant then offered and had admitted in evidence a letter dated Waukesha, Wisconsin, October 15th, 1907, addressed to Lent & Humphrey, attorneys, and signed by the Modern Steel Structural Company by R. H. Simpson, which letter was admitted in evidence and marked Defendant's Exhibit "D," which letter is in the words and figures as follows: [179]

[Defendant's Exhibit "D"—Letter Dated October 15, 1907, Modern Steel Structural Co. to Lent & Humphrey.]

"Waukesha, Wis., Oct. 15, 1907.

Lent & Humphrey,
Attorneys at Law,
San Francisco, Cali.

Gentlemen:—

We have your letter of Sept. 25th relative to the account of the American-Pacific Construction Co. with us and have noted carefully all that you say.

We take this opportunity of advising that at the time first reported to the Amer.-Pac. Cons. Co. our price for cancellation, we had to make up our figures somewhat hurriedly and we were not sure that all items of expense were in at that time, so had to furnish some figures in more or less approximate form. We have since had opportunity to go into the matter carefully in detail and so that you may understand our position we will go into the following detail, which we believe will give you insight and understanding of all of the items going to make our charge against your clients, which amounts to \$30,931.23.

We hand you attached a copy of our estimate on this job, such as we make out at the time we make our bid and this kind of an estimate forms a basis for every bid which we make.

The first item to figure is the cost laid down at our plant of the bare raw material. To this, we must add the bare cost of labor to make drawings. To the

drawing labor we add what our experience has shown us is the cost of supervision, drawing material, &c. in our drafting department. This for several years has amounted to an average of 15% of the total classified drawing labor. Then, we have to add, our bare shop cost of labor, which our past experience has shown us amounts to an average of 24¢ per 100# on the class of work which would go into the Columbia Theater. To the estimated shop labor, we add 60%. This item covers the cost of power and general overhead supervision of foremen, repairs to shop, [180] machinery, &c. This percentage has run for several years about the same and is also established in this way by past experience.

As you will note on our estimate, the following items, exclusive of material, are added together and in this case amount to something over \$13,000.00. To this \$13,000 is added 15% of itself, to cover the cost of maintenance of our general offices and soliciting. This percentage is determined in the same way as the others.

These items are added to the cost of the raw material and to this total is added $\frac{1}{2}$ of $\frac{1}{1}$ (?) This percentage covers loss by bad accounts and other misc. items, which cannot be well included under any of the other headings. This percentage is determined the same as those above.

Now, this method of figuring, is, as we say 'general,' in our business and covers not only the specific contract in question, but all others and must therefore be accepted as a basis to work from.

Our prices for cancellation is made up of items as

per the attached list, numbering from '1' to '11' inclusive and our explanation of these items will be carried out under those numbers.

#1. Represents the actual tonnage shipped to San Francisco before the contract was cancelled and is extended to \$1.90, the figure used in our estimate for bare material, and covers the actual cost to us of the bare material, without any labor on it.

#2. Represents actual shop labor up to date, performed not only on the material mentioned in item #1, but the unloading, handling, &c. of all material received in addition to item #1.

#3. Represents actual labor only on the drawings for the building up to the date at which time work was stopped.

#4. Represents freight on some small items of material which were ordered out of existing stock in Chicago at the request of the Amer.-Pac. Cons. Co., so that we might hasten the delivery of the first car or two—that mentioned in item #1. [181]

#5. Represents cash advanced to Mr. Smedberg, the engineer who was sent here to facilitate execution of the drawings.

#6. Represents the depreciation on the material ordered and cut to length for this specific job and left on our hands. It might be explained that material of this kind is ordered as fast as the drawings are far enough completed to show the exact or approximate lengths that will be required, and is cut to these lengths before being shipped by the mills to us. It is therefore of less value for any other job, as in order to use it in any place other than it is

specified for, it may have to be cut to shorter lengths at some waste, or spliced out to longer lengths at some expense. The exact amount of this depreciation cannot be determined, but is put at 20%, using similar instances of this kind as a precedent. It may be noticed in this item that the total material, which was received by us does not average exactly \$1.90 per 100#, as is called for in our estimate. However, should all of the material have come forward and the job been completed, there would likely have been enough steel at a lower price to bring the average back to \$1.90. This weight represents only a comparatively small part of what was contemplated originally to go into the building and it is a fortunate thing for every one concerned that we were able to cancel a large tonnage before it was rolled at the mills, thus saving considerable expense in the end.

#7. Represents the overhead expense, called 'Shop general' in our estimate. When the contract was suspended and work stopped in our shop, we think most every one will readily see how our overhead expense ran along just the same. That is, we consumed practically the same amount of fuel; we had to keep our regular number of superintendents, foremen, night watchmen, etc. This would not be dead expense had the job been completed as planned, as the work in the shop would have carried this overhead along with it.

#8-9-10. The same explanation pertain to these items. [182] It is perhaps a little difficult for anyone, not actually in the manufacturing business,

to appreciate the cost of overhead expense and if not thoroughly understood by you, we will be glad to go into it more in detail.

#11. Represents profit that we could reasonably have expected to make on this contract had it been carried out and is a fair average of what our shop does earn in the space which would have been taken up by this contract had it been completed. The amount is determined, as per detail figures at the bottom of our estimate sheet attached, by subtracting to total estimated cost from the total sale value of the contract. By this contract being suspended, the shop was practically emptied for the time allowed in our schedule for the Columbia Theater, and our payroll reports show a notable decrease as soon as we stopped work on the Columbia Theater, on account of our having to lay off a large number of men. We take this opportunity of saying that although we did lay off men, it was impossible to lay them off just in proportion with the amount of work which was taken from our schedule. It is hard to keep from holding more men to do some other little work that was running along with this job, than is necessary. It is hard to determine just what this would amount to and we have not attempted to make any charge for it. Had we known that this job was to be stopped a few weeks ahead of the time, we could have provided for other contracts to take its place, but work being suspended with absolutely no notice in advance, our shop was practically idle and made no profit for us during the time that the Columbia Theater would have taken. We are therefore

losers to this extent through no fault of ours.

Our President, Mr. S. B. Harding, during his connection with another structural shop, made settlement of a similar case on exactly the basis of the above. This was done amicably and the purchasers, upon going into the matter and investigating the conditions [183] carefully, were able to see the position of the manufacturers. This case is about parallel with an individual making an appointment with a dentist and then disappointing him—the dentist loses his time and cannot occupy it with other work very well while the rent of his office goes on just the same, as well as the salary of his office girl, expense of telephone, and those kind of things.

It is our sincere wish that your clients can be brought to see the reason and justice of our claim and it would be a matter of deep regret to us, should we be obliged to resort to the courts for collection. You must appreciate that we did not want to have this contract cancelled and your clients having done so can in no way be considered a matter of either pleasure or profit to us.

Yours truly,

MODERN STEEL STRUCTURAL CO.

R. H. S.

By R. H. SIMPSON." [184]

**[Estimate of Modern Steel Structural Co. Re
Columbia Theater Building.]**

**MODERN STEEL STRUCTURAL COMPANY—
ESTIMATE FOR CONTRACT NO. 561—Columbia
Theatre, San Francisco, Cal.**

1500 Tons Structural Steel at		
\$1.90 per 100#		57,000.00
Drawing Labor at .041½ cts.		
per C.	1350.00	
Plus 15% Drawing General....	202.50	
Shop Labor at .24 cts. per 100#	7200.00	
Plus 60% Shop General.....	4320.00	
	<hr/>	
	13072.50	
Plus 15% Office & Sol. Genl.....	1960.87	15,033.37
	<hr/>	
		72,033.37
Plus ½% Business General..		360.16
		<hr/>
TOTAL COST.....		\$72,393.53
SALE CONTRACT PRICE 1500 Tons at		
\$77.00 per Ton.....		115,500.00
Less Freight allowance on 1500 tons, at		
75¢ per 100 lbs.....		22,500.00
		<hr/>
Total Value of Contract.....		93,000.00
Total Cost of Contract.....		72,393.53
		<hr/>
Estimate Profit		20,606.47

218 *American-Pacific Construction Company*

1. Actual amt. shipped (material only)		
78470# at 1.90.....	1,490.93	
2. Actual shop labor to date.....	328.64	
3. Actual labor on drawings.....	669.28	
4. Actual misc. freight & cartage.....	9.73	
5. Actual amount advanced to Mr. Smed- berg.....	50.00	
6. Actual total material for building re- ceived & in our yard, or en route when cancellation was made.....		
..... 322535#	6154.22	
Actual amount shipped to Frisco.....		
..... 78470#	1490.93	
	244065#	\$4663.29
Estimated depreciation on 244065#		
20%.....	932.65	
[185]		
7. Estimated shop general (overhead ex- pense, shop only).....	4320.00	
8. Estimated drawing general (overhead drawings only).....	202.50	
9. Estimated office and soliciting general overhead expenses, office only.....	1960.87	
10. Estimated business general (propor- tion of bad accounts &c).....	360.16	
11. Estimated lost profit.....	20606.47	
		30931.23

Copy. Waukesha, Wis., May 28, 1907.

Following are the items which make up our cancellation price on Columbia Theatre contract:

Material as per accompanying	
four sheets weight 275481%	
at \$1.90, unloaded in our	
yard.....	5234.14
Car of steel invoiced.....	3021.09
Expenses and advanced Smed-	
berg.....	350.00
Shop drawings.....	1441.53
Unused shop space lying idle..	20183.24 \$30230.00

[186]

LIST OF MATERIAL PURCHASED FOR COL- UMBIA THEATER:

2—Is.	24" at 100#	—19' 0"	3800#
1—"	24" at 80#	—19' 0"	1520#
1—"	20" at 65#	—16' 7"	1078#
3—"	20" at 65#	—15' 6"	3028#
1—"	20" at 65#	—14' 9"	959#
4—"	18" at 55#	—16' 7¼"	3653#
1—"	do.	—16' 7"	912#
1—"	do.	—16' 6½"	910#
2—"	do.	—16' 4"	1796#
1—"	do.	—15' 3¾"	842#
2—"	do.	—15' 3"	1678#
1—"	do.	—15 2 5/8	837#
8—"	do.	—15' 2½"	6692#
1—"	do.	—14' 10½"	818#
1—"	do.	—14' 9"	811
2—"	do.	—13' 7½"	1499#

220 *American-Pacific Construction Company*

2—“	15" at 60#	—18' 8"	2240#
4—“	15" at 42#	—24' 2"	4060#
8—“	do.	—23' 7"	7923#
42—“	do.	—19' 0½"	33586#
3—“	do.	—18' 7½"	2347#
1—“	do.	—18' 6¼"	777#
1—“	do.	—18' 6"	777#
1—“	do.	—18' 5 1/8"	774#
2—“	do.	—17' 11"	1505#
4—“	do.	—17' 8"	2954#
2—“	do.	—17' 1"	1435#

[187]

1—Is.—15" at 42#	16' 0"	672#
1—“ do.	—15' 9"	622#
2—“ do.	—15' 6"	1302#
10—“ do.	—15' 5½"	6493#
5—“ do.	—15' 4"	3219#
7—“ do.	—15' 3½"	4496#
1—“ do.	—15' 3"	641#
2—“ do.	—15' 2¾"	1280#
1—“ do.	—15' 1½"	635#
1—“ do.	—14' 10"	623#
6—“ do.	—14' 8½"	3707#
2—“ do.	—14' 8¼"	1234#
3—“ do.	—14' 5½"	1822#
2—“ do.	—12' 7"	1057#
4—“ do.	—12' 0"	2016#
1—“ do.	—11' 9½"	506#
2—“ do.	—20' 8"	1736#
2—“ do.	—17' 3½"	1453#
1—“ do.	—15' 2½"	639#
1—“ do.	—14' 1"	592#

1—“	do.	—12' 9"	536#
4—“	12" at 21/12"	—18' 8"	2362#
14—“	do.	—17' 8"	7791#
1—“	do.	—17' 1"	538#
2—“	do.	—16' 8"	1050#
2—“	do.	—15' 10"	997#
6—“	do.	—15' 5½"	2918#
1—“	10" at 25#	—18' 6¼"	463#

[188]

1—Is.	10" at 25#	—18' 6⅛"	462#
8—“	do.	—17' 4"	3467#
4—“	do.	—16' 7¾"	1665#
4—“	do.	—15' 6"	1550#
6—“	do.	—15' 4½"	2306#
3—“	do.	—15' 4"	1150#
4—“	do.	—15' 3¾"	1531#
1—“	do.	—15' 3⅝"	383#
2—“	do.	—15' 2⅝"	761#
23—“	do.	—14' 9"	8481#
4—“	do.	—14' 3½"	8575#
1—“	do.	—12' 7"	315#
4—“	do.	—11' 0½"	1104#
1—“	do.	—10' 4"	258#
3—“	8" by 18#	—11' 0"	594#
1—“	do.	— 7' 8"	276#
1—“	do.	— 7' 7"	137#
2—“	do.	— 6' 4½"	230#
1—“	do.	— 5' 5"	98#
1 E	12" at 20½#	—10' 1"	205#
1—“	do.	— 7' 8"	157#
1—I	9" at 21#	— 9' 7"	201#
2—Es	8" at 11¼#	— 5' 7"	125#

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96—	Ls. 6x4x7/8	—21'	11¾"	57446 #
4—	Ls. 6x6x7/8	—13'	7¾	1806 #
4—	“ do.	—13'	7¾"	1806 #
8—	“ do.	—13'	7¾	3612 #
12—	“ do.	—14'	9¾"	5883 #
8—	“ do.	—15'	7¾"	4142 #

[189]

4—	Ls. 6x6x7/8"	—18'	7¾"	2467 #
8—	“ do.	—19'	7¾"	5200 #
4—	“ 6x6x3/4	—35'	5¾"	4073 #
4—	“ do.	—37'	5¾	4303 #
4—	“ do.	—42'	6¾"	4886 #
4—	“ do.	—37'	5¾	4303 #"

[190]

Defendant then offered and had admitted in evidence and marked Defendant's Exhibit "E" a letter dated Waukesha, Wisconsin, February 12, 1907, addressed to Thomas Vigus, General Manager of the American-Pacific Construction Company, which letter is in the words and figures as follows:

[Defendant's Exhibit "E"—Letter Dated February 12, 1907, Modern Steel Structural Co. to Thos. Vigus, Gen. Mgr. American-Pacific Construction Co.]

“Waukesha, Wis., Feb. 12, 1907.

Thos. Vigus, Gen. Mgr.,
Amer.-Pacific Cons. Co.,
San Francisco, Cal.

Dear Sir:

Columbia Theatre Steel Frame.

Replying to yours of Feb. 6th we desire to state in connection with the progress we are making on the

above building that there seems to be a considerable portion of the structure, the form and design of which is yet unsettled. The architect may have all this clear in his mind, but has not made it clear to us through his representative, Mr. Smedberg, whom we understand has written several times for added information.

It seems that Mr. Smedberg cannot be working in perfect harmony, for in being sent on such a mission as he is apparently sent here, he should be able to furnish us with such information and data regarding the structure, in advance of our work, so that we would not be handicapped and delayed as we have been thus far in the preparation of the detail drawings.

We have not complete information as to how the steel frame should be built in its entirety. If we had this, we could make rapid progress. We can only depend on Mr. Smedberg and he undoubtedly had no knowledge of the requirements. He has approved three detail drawings thus far and we judge that there will be from 75 to 80 drawings on the building. We cannot go ahead as fast as we would like and complete as we go because of the information which is lacking. When we fabricate the steel for this building, we want to do it in some kind of rotation and the drawing work will be at [191] a standstill, and we will be obliged to suspend work unless we are given the requirements to go ahead with. Had we known that Mr. Smedberg would not be in possession of all the information, when he arrived here (which was the understanding between your

(Testimony of F. W. Harding.)

Co. and the writer when in San Fran.) we would never have signed the contract, or begun any work until we knew that this information was all available, as it would only repeat a hundred unpleasant experiences. It is just dragging the whole matter into a muddle and the boys who are working on it have already lost heart. Therefore, please give us an order to suspend work until we know what to do, or in some way tell us what is wanted in this building.

We put up a 3,000 ton job last summer in 93 days from the time we got the contract and it was only because all concerned knew what they wanted. This job of about 1,200 tons is going to drag for months at this rate, and we will have to put other work in its place if we do not get a complete starting point at once.

Yours truly

MODERN STEEL STRUCTURAL CO.

By S. B. HARDING."

The COURT.—I suppose, Mr. Harding, that in the fabrication of steel for a building you necessarily expect to have the plans furnished so that you can fabricate that which is to go in the lower part or front of the building first? A. Yes.

Q. And then work on up?

A. Yes. May I add that the information asked for is the architect's general drawings from which we can prepare these kind of drawings? (Referring to detail drawings.)

Mr. HUMPHREY.—Q. Those are the general

(Testimony of F. W. Harding.)

drawings from which you figure out what you are going to do? A. Yes.

The COURT.—The architect's general conception and drawing of what the building would be? [192]

Mr. HUMPHREY.—Q. From which you estimate the amount of steel to go in and the way in which it is to be fabricated; is that correct?

A. Not necessarily, because if we know the dimensions of a building we know from experience what that building will weigh if we know the cubic foot rule.

The WITNESS.—(Continuing.) We cannot tell how to fabricate the steel until we have the design from the architect; until we have that design we don't know what the members are going to consist of absolutely. If we were engineers we could, otherwise we cannot use our own judgment in a matter of that kind. We have to wait for the architect.

Thereupon defendant offered and had received in evidence and marked Defendant's Exhibit "F" letter dated the 3d of April, 1907, from the Modern Steel Structural Company to the American-Pacific Construction Company, which letter reads as follows:

[Defendant's Exhibit "F"—Letter Dated April 3,
1907, Modern Steel Structural Co. to American-
Pacific Construction Co.]

(LETTER-HEAD MODERN STEEL STRUCTURAL CO.)

"Waukesha, Wis., April 3, 1907.

Amer.-Pac. Cons. Co.,
San Francisco, Cali.

Gentlemen:

We have yours of March 28th and referring to that portion of it relative to Columbia Theatre would say that we expect to make further shipments in about six weeks.

We have noted what you say about billing and will be governed accordingly.

As to the plans, we have everything agreed upon satisfactorily up to the 8th floor, excepting that the architect has promised us sections of the stair boxing, showing location of stair stringers, so that we can provide for their connections on to the beams.

We have not come to any definite understanding relative to the roof plan, pent house and cornice details. At this writing, we do not know whether the architect wishes to give us details to [193] work upon, or whether we are to work up this roof plan for his approval.

You, of course, understand that all of the above applies only to the front or office portions of the building.

Yours truly

MODERN STEEL STRUCTURAL CO.

R. H. S.

By SIMPSON.

(Testimony of F. W. Harding.)

P. S.—Although we have not heard from the eastern lines relative to the freight matter yet, we hardly think there is any saving over rail when the time is considered. Our rate from Waukesha to the Atlantic Coast is about \$5.00 per ton and the water rate, you say, you think is about \$9.00. This would make a through rate of \$14.00 for 40 to 60 days delivery as compared to \$15.00 by rail within 10 to 20 day delivery under normal conditions.”

Thereupon defendant offered and had admitted in evidence the portion of the letter marked Defendant’s Exhibit “G” dated February 12, 1907, to the American-Pacific Construction Company of California, and signed by the Modern Steel Structural Company, which reads as follows:

[Defendant’s Exhibit “G”—Portion of Letter Dated February 12, 1907, Modern Steel Structural Co. to American-Pacific Construction Co.]

“This theater job, we estimate from the plans, to weigh about 1,200 tons, and it is only a small matter to produce such a building, if we could have a starting point.”

Redirect Examination.

Mr. TAYLOR.—What condition were the plans in when you concluded it would take 1500 tons?

A. In a general way, we just knew that it was to be a steel frame structure of so many cubic feet, and taking the cubic feet rule we arrived at the tonnage.

Q. 1,500 tons?

A. Yes. We did not need to see the size of the

(Testimony of F. W. Harding.)

material to know what the weight of the structure would be.

The WITNESS.—(Continuing.) The first item on exhibit "B" which is a copy of ledger sheet or cost sheet, and which was offered by [194] the defendant is \$236.00, and is no doubt a summary of what went to make that total of \$236.03. For the work to January 31st, Shop labor to January 31st, \$2.36; February 15th, \$49.28; shop labor, and freight on local material from Chicago \$9.73; February 28th shop labor, \$233.96; shop labor, drawing, labor, \$247.83; purchasing records \$21.63. That is, no doubt, material. All of these items in this column are weight of material, and cost of material in next column. Then is shop labor again, shop labor again, shop labor again, shop labor again, drafting, office labor again, purchasing record, shop labor again, purchasing record, and that refers to material and the prices it cost. The items contained in that ledger sheet do not apply only to the tonnage that was shipped. That applies to all the material received at our works, not only the 39 $\frac{1}{4}$ tons we fabricated and sent on, but 122 tons additional that laid there after the cancellation and the preparatory work that had been done up to that time not only for the purpose of the 39 $\frac{1}{4}$ tons. We had to pay for material that came in after the contract was cancelled, that we could not stop and that is the reason there are items here as late as January 15 or February. The item of \$21.63, February 28, was actually shop labor.

(Testimony of F. W. Harding.)

Recross-examination.

The WITNESS.—The cost or ledger sheet, Defendant's Exhibit "B" is the bill of all the work that the plaintiff did under that contract with the American-Pacific Construction Company, whether of drawing, or shop labor, or anything else. I know of no other, except a lot of incidentals that we have here that came out in the testimony here.

Q. Name anything that you omitted from that sheet, please. A. Paint brushes.

Q. Is that considered in your overhead charges?

A. No, sir.

Q. Then that sixty per cent and 15% do not include overhead charges for paint brushes?

A. The overhead of 60% and 15% would include [195] standard paint, and if any special paint was used it would be charged as additional to the overhead. I expect in this particular case that it would cover the paint, but, however, we have allowed a credit for the paint so as to be on the safe side.

The WITNESS.—(Continuing.) I believe all the items that went into the cost of doing this work are included in the cost sheet with the exception of the ones I have just mentioned. I am unable to answer whether we have any ledger accounts with the American-Pacific Construction Company, except I am quite sure that we showed on our books a claim against the American Pacific Construction Company for \$30,000. We are carrying it as an obligation of the American-Pacific Construction Company due to the Modern Steel Structural Company.

(Testimony of F. W. Harding.)

Q. You are just carrying it as an obligation, as an account for that amount of money?

A. Yes. I am not absolutely positive as to that, but it is something like that.

Q. Do you know whether or not that ledger account was closed and when it was closed?

A. Closed, and possibly shown right here. I should say after that part of the work was performed (referring to entry on exhibit "B"). We have not entered on that account there what the American-Pacific Construction Company owes us.

Q. You mean for future profits that you would have earned if that contract was carried out?

A. We are carrying such an account on our books.

Q. Which account includes what you estimate would be your profit? That account was closed when this litigation began by the notation on it "in litigation"? A. This account was closed.

Q. In so far as entries being made upon it?

A. Yes.

Q. And entries were made upon that account up to the time this litigation began? A. Of this nature.

Q. That went into the cost?

The COURT.—He has said so several times.
[196]

The WITNESS.—On that particular part of the work, it is all past as far as it had gone.

Mr. HUMPHREY.—Q. Did you fabricate any work other than you shipped to us?

A. On this contract?

Q. Yes.

(Testimony of F. W. Harding.)

A. No, sir, I do not believe that we did fabricate any other.

Redirect Examination.

Mr. TAYLOR.—Q. Mr. Harding, the sheet that you have presented here presents the actual items you had paid out as costs. Is that correct?

A. Yes.

Q. And does not embrace the damages by reason of the breach of the contract? A. No, sir.

Q. There is nothing stated in that about a breach of contract. A. No, sir.

A JUROR.—May I ask a question?

The COURT.—You may ask me the question, and then I will ask the witness if I deem it proper.

A JUROR.—I would like to know if that is not a cost sheet and not a ledger sheet?

The WITNESS.—It is a cost sheet.

The COURT.—Mr. Humphrey called it a ledger sheet and nobody corrected him.

Mr. HUMPHREY.—I meant a cost sheet.

Thereupon the plaintiff rested and the defendant moved the Court for a judgment of nonsuit and dismissal on the following grounds.

1. That there is a failure of proof in the following particulars:

a. It is not shown by the evidence that there has been a completed contract; on the contrary, the evidence shows that the contract is incomplete and imperfect in this:

That the proposal which is set forth in the evidence here [197] and dated the 4th day of Janu-

ary, 1907, states that the defendant was to furnish certain structural steel, in accordance with drawings and specifications to be furnished by Joseph Smedberg, which were identified with certain marks. It affirmatively appears from the evidence that those drawings have never been made nor furnished.

2. There is a variance in this: The contract alleged required the plaintiff to deliver to defendant at San Francisco the fabricated steel on or before the 1st day of September, 1907, while the contract placed in evidence by plaintiff required delivery to be made within sixty or ninety days after completion of the detailed drawings.

3. There is a variance in this: The contract alleged states that there was an agreed tonnage of 1500 tons of steel to be furnished while the contract placed in evidence shows there was no agreed tonnage.

4. The action is premature inasmuch as the contract offered in evidence provides: "In case any difference of opinion shall arise between the parties to this contract in relation to the contract, the work to be, or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract, and these two shall have the power to name an uninterested umpire, whose decision shall be binding on all parties to the contract." From the evidence it appears that there was no arbitration, and therefore the action is premature.

5. There is no evidence of damages. The attempt to show loss of profits or damages failed.

(Testimony of William M. Breite.)

There is absolutely no evidence of the costs, hence there is no way of determining any damages, except by guesswork.

The motion was denied and exception taken to the ruling denying the motion, which exception defendants hereby designate as [198] its Exception No. 10.

(Exception No. 10.)

Testimony of William M. Breite, for Defendant.

WILLIAM M. BREITE, being duly sworn as a witness on behalf of defendant, testified as follows:

My name is William M. Breite. I reside at San Francisco. I have been, for twenty years past, a structural engineer. I followed that profession in Minneapolis, Chicago and New York City. In addition to that, I had experience in steel factories and mills, including two years' experience in the shops. I have designed steel work for buildings in San Francisco, including the Orpheum Theater and Princess Theater, the Alcazar Theater, the Valencia Theater, the Richmond Theater, the Broadway Theater and several other small Theaters. In designing these different structures, or the steel work for these different structures, I have had familiarity with the cost of fabrication of steel for such structures as compared with ordinary office buildings. I have designed 952 buildings in San Francisco since the fire of April 18, 1906, and I made an investigation concerning the factory cost of fabrication throughout the rest of the country in 1907. I took a three

(Testimony of William M. Breite.)

months' trip east from May to August, 1907, and visited the Minneapolis Steel & Machinery Company of Minneapolis, the American Bridge Plant at Minneapolis, the Lassig plant at Chicago and several other smaller plants in Chicago; the Ambridge plant, Pennsylvania and three or four plants in New York City. The shop work and drawing work for a theater is about 50% higher than the shop work and drawing work for a hotel or plain office building, or an apartment house. It is more difficult and expensive by reason of the large spans, the cantilever construction, box construction and very difficult curve work and large roof trusses. This work doesn't enter into the construction of an office [199] building or a hotel. I have examined the exhibits that are on file (referring to the exhibits attached to the deposition of S. B. Harding). I mean the drawing and material sheets and papers that are annexed to the deposition of Mr. Harding. I examined the same very closely. They comprised thirty-one tracings, 24 by 36, and 28-beam sheets, and 68 shop bills, and only cover the office portion of the proposed building. The drawings include in all only 262 tons. Only 262 tons are shown on the details of the shop bills. There is no paper in the record or annexed to the deposition of Mr. S. H. Harding that would enable a man or an engineer to determine how many tons of steel would be required for the completion of the building referred to in said deposition. Before the number of tons of steel for any particular big building may be determined, there must be a

(Testimony of William M. Breite.)

complete design showing each steel member that enters into the building. Without that complete design it is not possible to tell the number of tons.

Q. Without that complete design is it possible to tell the number of tons?

A. No, sir, not in this case.

Q. Why not in this case?

A. Because there is nothing here that shows which way the theater portion was to be constructed.

Q. Nothing that shows the theater at all?

A. No, sir. There is a portion of the plans here that show a portion of the theater, but without any size or figures or dimensions on it from which you could draw any conclusion whatsoever.

Q. Why is it not possible to cube such a building, and make anything like an accurate estimate of the number of tons?

A. It is impossible, because the engineer, or the man that is cubing up the building, cannot put himself in touch with the architect's idea of his method of construction. The architect may design some very elaborate architectural features that require [200] a great deal more steel than other features, and until the design is completed it would be impossible for a man to cube up a theater building, or a theater, or a church, or a large auditorium, or building of any such character.

Q. What would you say would be the shop cost, the actual shop cost, I mean as distinguished from any overheads, in fabricating steel for a theater, or

(Testimony of William M. Breite.)

any particular or special building such as you have mentioned?

(Here, to meet the objection of the plaintiff, the witness testified as to his experience in the matter of the cost of fabrication as follows:)

I have been with the Judson Manufacturing Company as contract manager, and I am also interested here in iron work. I was with the Judson Manufacturing Company four months in 1908 after my return from the East. Since then I have been connected for the last five years with iron works in the city here, as a stockholder, and I am the engineer. I order their jobs and I have to keep track of the labor cost and detail cost. I worked in a factory or mill of J. B. and J. M. Cornell Iron Works, New York City, for two years. I was not in that way brought in touch with the cost of fabricating. I know nothing about it; but during my twenty-one years as a structural engineer I have been required to familiarize myself with the cost of fabrication, and to figure the cost of fabricating the material. A client comes to me and asks me how much a building will cost and I must necessarily know all the costs connected with that building, as far as the steel work is concerned; so it is necessary that I follow the shop cost, the detail cost, and the cost of erection, and I have been doing that since 1900.

Q. Now, Mr. Breite, what would you say in regard to the shop cost and the cost of the detail drawings in regard to a theater building?

A. The shop cost and detail costs on theater work

(Testimony of William M. Breite.)

would run 50% [201] higher than ordinary office buildings would.

The WITNESS.—(Continuing.) The cost of fabricating steel for an office building in the year 1907 was between six and nine dollars a ton, actual cost. A special building like this or hotels, it would run 50% higher, in some cases. I have had experience in these costs in the section of the country where the steel was fabricated in the year 1907. My experience was in Minneapolis and Chicago, where I went to investigate conditions before I took the position with the Judson Manufacturing Company, to familiarize myself with shop practices. The actual drafting room, or drawing cost omitting overhead charges, per ton for detail drawings for an office or hotel building, would be not less than a dollar and a half a ton. And it would run from three to eight dollars a ton. The cost of a theater, the special type of construction, large roof trusses, big open auditoriums, without any columns, large girders and large cantilever balconies, and gallery supports, a lot of bent and long curve work,—those add to the cost.

Q. Assuming that the building for which you say these detail drawings were made would contain 1200 tons, what part of the detail drawings for the work would you say had been completed?

A. Well, I would say about 10% of the work.

Q. Why do you say that?

A. There are 256 tons represented on the drawings. In point of tonnage it would be about one-fifth, but in point of work necessary on those draw-

(Testimony of William M. Breite.)

ings for the theater portion, which would be a much more difficult matter, I would judge from my experience with the work, that there has been done—I would judge that there had been done about ten per cent of the drafting room work. In point of tonnage it would be one-fifth, or twenty per cent of it.

Cross-examination.

Nineteen years ago, I worked in the shop of J. B. and [202] J. M. Cornell, assisting in laying out material, punching material and assembling material. It was two years after I was out of College, I assisted in the fabrication of steel. I next worked for various railroads around New York, doing railroad work, locating and working at bridge work for four years; after that I was with the Standard Oil Company at Bayonne, New Jersey; I was chief of the squad there, the surveying squad, and also did general engineering work. I was there for a year laying out tanks and general building. Then I worked over in New Jersey at general engineering, such as surveying and building sewers connected with the Passaic sewer. That brought me to the year 1899, when I left New York and came West to Minnesota, where I worked as assistant surveyor in Beckett County, Minnesota, surveying roads, etc. In 1900 I went to work for the American Bridge Company in Minneapolis as draftsman, doing engineering work in the drafting department. The work of that company is principally bridge building. It builds bridges and buildings. The American

(Testimony of William M. Breite.)

Bridge Company builds more buildings than it does bridges. I was with that company in the drafting room until 1904, as a employee. Then I came out here and went into business in November, 1904, and have lived here ever since. I have never been an architect, but I am an engineer. I was never an accountant in any manufacturing establishment that fabricated steel. I never employed men who worked with their hands in fabricating steel, nor do I know the wages that the Modern Steel Structural Company at Waukesha, Wisconsin, paid its men for fabricating steel. The cost of fabrication depends on the wages paid and the work a man would turn out in a day. No man can give an intelligent answer without knowing those factors.

Q. Now, if he did not know what was paid to the men and how much the men turned out in a day, how could he know? A. By comparison.

Q. By what?

A. By comparison. The local shops are now competing [203] with the eastern firms, and doing the work at lower figures.

The WITNESS.—(Continuing.) I do not know what wages were paid in 1907, by the plaintiff, nor do I know what work was expected of a man to turn out in a day; in order to determine its cost I should know these factors.

Q. If I understand you correctly, since you worked in New York, you have not worked in a shop or a factory where they fabricated steel, and where you had anything whatever to do with the wages paid

(Testimony of William M. Breite.)

the men, or the quantity of work they turned out, have you?

A. Not directly with my own hands; no, sir.

Redirect Examination.

The WITNESS.—Since 1906, I have been engineer for many buildings and am now working on order No. 953. Some of the steel for these buildings was fabricated locally, and some outside of the State of California. The portion that was fabricated outside of the State of California was scattered generally over the United States. And when I testified to the different items of cost, I did so from my experience in fulfilling these 952 contracts, as well as my general experience in other work.

Q. In answer to a question on cross-examination, you stated that you had nothing to do with the employment of men in fabricating. Are you interested in some steel shop here? A. Yes.

Q. What is your interest in that, what do you do?

A. I am a stockholder and have for four years kept the cost account of the work in the shop.

Mr. TAYLOR.—Q. In your capacity as an engineer, in trying to find out the cost of structural steel, what you deal with is the finished product, you find out what you can get the finished product for?

A. Not necessarily. [204]

Testimony of Peter Zucco, for Plaintiff.

PETER ZUCCO, being sworn as a witness on behalf of defendant, testifies as follows:

My name is Peter Zucco. I am a consulting engineer. I have followed that profession for 21 years.

(Testimony of Peter Zucco.)

When I say civil engineer, that means I have a degree as civil engineer. I have worked for over 12 years in the old country as a structural engineer, for about 4½ years in this country, in New York City, for the Thompson-Starrett Company. I was civil engineer with the Thompson-Starrett Company. I was sent by them out here after the fire to work at estimating buildings and supervising buildings. While I was with the Thompson-Starrett Company, I did all the estimating of steel structures, pretty nearly all of the building. I checked over pretty nearly all of the buildings they put up at that time, both in this city and New York City. I am still following my profession here. I am a consulting engineer in this city. I have designed and checked the structural steel for some 400 or 500 buildings, both in San Francisco or New York.

Thereupon the witness' attention was called to the papers annexed to the deposition of S. B. Harding, which papers comprise 31 drawings, 28 beam sheets and 68 shop bills.

Q. Have you looked at those papers?

A. Yes I have looked at those papers.

Q. Did you estimate the amount of tonnage that is covered by those papers? A. Yes.

Q. About what tonnage was covered by them, would you say? A. About 256 or 257 tons.

Q. Is there any drawing or design there from which it is possible to determine the exact tonnage that would go into that building?

A. Absolutely not, sir.

Cross-examination by Mr. TAYLOR.

The WITNESS.—I was a civil engineer in the old country and [205] worked at my profession a number of years, pretty nearly 12 years. I am in business for myself now. I worked for the Thompson-Starrett Company until Mr. Starrett left the company. When I was with that company I was an engineer. I never worked in a shop where steel was fabricated.

Testimony of C. H. Snyder, for the Plaintiff.

C. H. SNYDER, being duly sworn as a witness on behalf of defendant, testified as follows:

My name is C. H. Snyder. I am a contracting engineer with Milliken Brothers, and have been employed as contracting engineer with Milliken Bros. for 12 years. Prior to that time I was a structural steel draftsman with Milliken Bros. and the Keystone Bridge Company. Since I have been out here, as contracting engineer, I have been brought in contact with the cost of work and checking over it but not in the office. My duties as contracting engineer for Milliken Bros. are to take plans as given us by architects or engineers for estimating, and to estimate the quantities and prices and make a quotation. In the last 12 years I have estimated the quantities and given prices and made quotations for the work on 60 or 70 buildings, probably more. I could not tell that offhand; and among those were several theatres. I am now furnishing the steel for the theatre on Market Street, near Seventh, in San Francisco. The shop cost of fabricating steel for a thea-

(Testimony of C. H. Snyder.)

tre in 1907 would in my opinion be about ten to twelve dollars a ton. The approximate cost of fabricating steel for a theatre would be something like ten or twelve dollars a ton. It might be more than that. It would depend very much upon the character of the work. The cost of preparing drawings, detail drawings for a theatrical building might be anywhere from four to eight dollars a ton, depending upon the merits of the work. The [206] shop cost of fabricating steel for a theatre building is a great deal more than for fabricating steel for an office or hotel building, I don't think I can give the percentage higher than the cost of a theatre would be than an office or hotel building, except in a particular job, but I should say it would be at least fifty per cent more.

Cross-examination.

I saw the drawings for the Columbia Theatre Building. I don't now recollect how large the building was to have been. I think it was to have been six or seven stories high.

Q. Don't you know it could be eight stories high, and don't the plans so show?

A. Possibly they do. I could not say.

Q. Don't you know that it was to be 149 feet 6 inches one way by 120 feet the other way?

A. Probably you are right. I don't know. I don't recollect now.

Q. And the theatre part placed in the building of the dimensions that I am talking about, 149 feet, 6 inches one way by 120 feet the other way, eight

(Testimony of C. H. Snyder.)

stories high, or 112 feet, would occupy only a part of the building? A. Yes, probably it would.

The WITNESS.—When I was talking about the additional cost of steel for a theatre building, I meant that steel which related to the theatre proper.

Q. And that would not relate to that which went above the theatre or on to the side of the theatre, or back of the theatre?

A. Not necessarily; I answered the question that was put to me, and my answer applied only to the theatre matter.

Q. The mere fact that there was a theatre in one corner or in one end, or one side, or the middle of the building, would not affect the cost of the drafting or fabricating of the steel for the rest of the building, would it? A. Yes, it might.

The COURT.—Q. Would it be likely to?

A. Yes, for this particular job. [207]

Mr. TAYLOR.—Q. Did you see the form of the theatre that was to be put in this building?

A. No, sir, except in those papers here.

Q. What was the form of it?

A. It shows a circular form on the plan, where the theatre was going.

Q. And what were its dimensions—you say you could not tell that now, without looking at the plans?

A. No, sir.

Q. What was its height?

A. It was to be, I think the roof was at the sixth floor, but I am not positive of that, but that is my recollection.

(Testimony of C. H. Snyder.)

Q. You don't know?

A. It was about the sixth floor; I know that.

Q. Will you show me the plans that shows that?

A. Certainly, if I have them here. (The witness hands the plan to the counsel.)

Q. Is this the plan of the sixth floor that you just looked at? A. Yes, sir, this is the plan.

Q. What is there on this plan that shows the roof? Point it out to the jury.

A. It is shown right in there (indicating).

Q. Was that to be a glass roof?

A. I don't know what the character of the roof was to be, but that is the roof in there.

Q. That is the roof of the theatre? A. Yes.

Q. And does that white space represent what would be the theatre under that roof?

A. This white space represents where the stage was. I am just judging by the looks of these plans. I have not seen the architectural plans.

Q. Do these marks on this plan indicate iron work? A. Iron work, yes.

The WITNESS.—(Continuing.) These plans are for the iron work, and these lines would each represent a member of iron. The members of iron as shown on the sixth floor for plans might indicate anything, but would be a kind of structural steel that would be easy to fabricate. I don't know of my own knowledge how high [208] the theatre proper came, but the theatre, I should say, was below this roof. The other plans indicate how high the theatre was and how long. These plans that have been ex-

(Testimony of C. H. Snyder.)

hibited here indicate the size and position of the theatre. These drawings here indicate that this is all (referring to the sixth floor plans) of the theatre, because here is a frame that looks very much like a box frame. That is all that I can tell you.

The WITNESS.—(Continuing.) In dealing with steel, we make our bids for the rough material and then fabricate it, and then paint it, and then ship it. We fabricate it in our shop in Staten Island, New York. I have worked in the drafting-room of that shop, but not in the shop. I was head draftsman in the drafting-room for two years. I did no work in the shop at all.

Redirect Examination by Mr. HUMPHREY.

Q. From the examination you made of those plans could you tell what portion of the entire building the theatre will occupy?

A. It occupied more than half of the ground space.

Q. And did it extend up to the other floor?

A. Yes, the sixth floor.

Q. On the sixth floor is there trussing indicated?

A. Yes, that is marked right here on this plan.
(Indicating to the jury.)

Q. The entire space of the roof is covered from there to there and from there to there (indicating)?

A. Not at the sixth floor, but one of these other plans shows the roof over the stage portion, which is a little bit higher,—one story higher. These plans indicate that the floors are the same. I don't think that I could tell whether they are absolutely alike or

(Testimony of John D. Galloway.)

not, but they are certainly very similar. There is no question about that.

Testimony of John D. Galloway for Defendant.

JOHN D. GALLOWAY, being duly sworn as a witness for defendant, [209] and testified as follows:

My business is in San Francisco, and my residence is in Berkeley. I am a civil engineer, associated with Mr. Markwart. I have been a civil engineer—"civil engineer" is an inclusive term, including structural engineers. I have been in the business for 23 years, two years and a half in the State of Washington, and the rest of the time in San Francisco. I have designed the steel work for several buildings and prepared the detail drawings for the steel work. To a certain extent I am familiar with the cost of detailed drawings for steel work and with the cost of making detailed drawings for a theatre building. The question of cost of making detailed plans depends greatly upon just how large and to what extent the shop in which you are working, or working for, demands information to be placed upon the plans. I would consider that the detailed plans for a theatre would cost in the neighborhood of \$5.00 per ton for structural work. I have examined the drawings on file in this matter. These drawings or plans on file are not at all what is known as architectural plans. They are what is known as steel drawings, some of them being shop details, and some of them being plans that are usually designated as

(Testimony of John D. Galloway.)

engineering plans made by the architect. There is nothing there among those plans that would allow one to make an estimate of the total amount of weight in the building. The method of obtaining the weight of steel in a building by obtaining the cube of the building is regarded as merely the generally method and is not accurate in any sense of the terms. I would add to that statement that on account of the complications entering in a theatre building and in the design of the theatre building, that it is practically impossible to tell the total weight of structural steel in a theatre building without knowing the design. The only way in which to determine accurately the weight of steel in a theatre building would be to have the plans prepared and an [210] estimate made, piece by piece of each one. In the plans I have examined there is a central portion bounded on three sides by straight lines, and on one side by a curved line, which I am told was the portion intended for the theatre. There is nothing in the plans, as far as I could see to indicate that it was to be a theatre; it may have been an open court. The plans are incomplete, but, assuming the information to be correct that this portion was to be occupied by a theatre, so far as the cubical contents were concerned, the theatre would have occupied considerable more than one-half of the building. In addition to the portion which is bounded by the curved line that I speak of, I would say that the curved line would indicate that this is the portion formed by the galleries of a theatre, and

(Testimony of John D. Galloway.)

it is necessary to have, back of those galleries, there is aisles and foyers and places which are taken up by the exits. With those ideas, I would say that the space shown would be taken up in this way, and that that part to be occupied by the theatre would have been considerably more than fifty per cent. I should judge, without any actual measurement, that at least 75% of it would have been the theatre portion.

Q. Assuming, Mr. Galloway, that those drawings were to cover a building for offices, or a hotel, six stories high, rather than a theatre, is there any part that could be left for the theatre but the part indicated by the curved line?

A. No, sir, there is not.

Cross-examination.

The WITNESS.—I do not know how many stories high this building was to have been. I saw the plans there, showing the first story and the mezzanine story, and I should judge that the building was to have been nine stories high. I will state this: That in a certain portion of one of those floors, which you state to be the sixth, there is an interior court, in which there is marked the roof of the theatre. I take it that you state correctly [211] that it is the sixth floor. There is nothing on the plans to show how high the ceiling of the theatre was to have been. In order to make my statement clear to the Judge and Jury, it is necessary to explain the word “theatre” under the building ordinance is a certain definite thing, and when you ask me a question if the roof would be 20 feet high and that if that would consti-

(Testimony of John D. Galloway.)

tute a theatre, I am unable to answer you, because under the building law a theatre is a definite thing. I don't know anything in the building law requiring the roof to be more than twenty feet high, and I don't know the restrictions of the building law in reference to a theatre. I don't know that this building was planned so that the first story would have been 20 feet high. There is nothing on the plans to show that the greater bulk of the upper stories of this building was intended for offices, but I have reason for inferring otherwise. I know something to the contrary. The only plans I have seen are those on file here. These details that were drawn for steel. There is nothing on the detail drawings to show around the sides of the first story there was to be stores. I think the height of the various stories could be found out from the plans. In office buildings there are typical stories, and on typical stories the plans drawn for the girders and beams for one floor, if the others are typical, as a rule, could be adopted for the floors above.

Q. I am supposing a case. Supposing this building was eight stories high, and supposing the ceiling was only to go up to the third floor, and supposing it took all of that space you see in white on the ground floor would you then still say that the theatre could take more than half of the building?

A. That would be a matter to determine by actual measurements.

Q. Would it, or could it?

A. It certainly could.

(Testimony of John D. Galloway.)

Q. Do you mean to say that where the theatre would not be over three stories high, and beginning above the third floor joists [212] there were offices on the third, fourth, fifth, sixth, seventh and eighth floors, and where the theatre did not take up but a part of the first, second and third stories, that the theatre would still occupy more than half of the space in the building?

A. It is impossible to answer that question.

Q. Why?

A. Because it needs a definition of what is a theatre, and what portion of the building is devoted to the actual purposes. I am assuming that the theatre part is where plays are given, the walls surrounding it and the ceiling above it; now, assuming that that was included in my question would you say then that the space that occupied a portion of the first, second and third floors occupied more than one-half of the building?

A. It is impossible to answer that question.

Q. If you cannot answer it I will not press it."

Mr. TAYLOR.—Q. Were you employed as an expert in this case? A. The attorneys—

Q. Were you employed as an expert in this case?

A. That question is impossible to answer.

The COURT.—Were you employed to come and paid to come here and give your testimony?

A. Yes.

Redirect Examination of the Witness.

It is impossible to answer the question of counsel for the plaintiff, for the reason that it is impossible

(Testimony of John D. Galloway.)

to tell how much area in a certain building is to be occupied by a theatre, and how much is to be occupied by certain stores or offices, until exact measurements are taken showing the relative proportions to be occupied by the two things.

The COURT.—On what did you base your answer in direct examination that in your judgment the theatre would occupy from fifty to seventy-five per cent of the entire building?

A. I qualified my answer to that question, your Honor, by the [213] statement that the plans show certain curved lines, one curved line and four other lines indicating that this was to be occupied as a theatre, and then taking the plans and finding that the roof was at the sixth floor, and estimating from knowledge of the necessities of a theatre, that a certain portion would be occupied by galleries and for theatrical purposes, exits and foyers, and other purposes in the theatre, and that underneath the first floor would be the various dressing rooms and storage rooms, and then at the back would be the stage and the beams and above that would be the galleries, and knowing all those things I stated as—

Mr. HUMPHREY.—Q. Counsel asked you on direct examination a hypothetical question, as you might term it, and assumed that this theatre in this building would extend only to the third story, would you still say as you said on direct examination that the theatre would occupy fifty per cent of the space in that building, and you said you could not answer that question.

(Testimony of John D. Galloway.)

A. I do not know what he meant by the expression "devoted to theatrical purpose."

The COURT.—You have defined that in your mind for the purpose of answering the question that you have just answered here; can you define it for the purpose of answering counsel's question on cross-examination?

A. I will answer this; that I think the portion there that would have been devoted, which I would have supposed to have been devoted to theatrical purposes, was at least fifty per cent of the total contents of that building as shown by those plans.

Mr. HUMPHREY.—Plaintiff's counsel's question was not based on the plans.

Rebuttal.

Testimony of F. W. Harding, Called for Plaintiff in Rebuttal. [214]

F. W. HARDING, recalled as a witness on behalf of plaintiff, testified as follows:

Q. Mr. Harding, what part of the drawings for a theatre building proper, the average theatre building, presents intricacies in drawings?

This building is a theatre and office building. The open space that is indicated on those plans is not filled with a lot of work. The only way that that work can be averaged with the whole is to consider what part of the theatre work is difficult work. The office portion and store portion is plain work. The difficult part of the work that some stress has been

(Testimony of F. W. Harding.)

laid on there is a very small proportion of the whole work. To answer the question directly, I would say from forty to fifty per cent of the building, according to this open space, would be occupied by the theatre. That would be just a comprehensive view; it might be thirty per cent, or it might be fifty per cent. The tonnage that would be apportioned to the bulk of the building, as I stated yesterday, I believe would not exceed twenty per cent of the whole work in the building. To make myself clear on that, theatres are not all alike. It depends upon what duplication there is. In this particular case, there is considerable duplication. I should say that for the portion of the theatre work, five dollars a ton is not out of the way for the cost of drawings for that part of the whole structure.

Q. What tonnage would it take for that?

A. Well, I should say twenty per cent of the whole tonnage of the building would be that class of work.

Cross-examination.

Mr. HUMPHREY.—Q. What would be the whole tonnage with the theatre proper?

A. I believe it would be 1500 tons.

Q. In the theatre proper?

A. In the theatre part, the theatre part of the building. [215]

Q. I would like to invoke the same rule. I would like to have my question answered directly. What part?

A. I would have to know what the theatre part of the work is. If you ask me the question what part

(Testimony of F. W. Harding.)

of the work is more difficult than the other, like boxes and galleries, I would still say as I have said before, that it would be about twenty per cent.

Q. Is that the only way that you can answer my question? A. Yes.

Q. What part of the whole building would be occupied by the theatre, do you know?

A. I can only form that impression. It would be anywhere from thirty to fifty per cent.

The WITNESS.—(Continuing.) You would not be able to state what character of steel or truss or members would be required until the design was prepared by the architect, would you?

A. Yes, you would by knowing what the city ordinances were. If you were designing a building to comply with those city ordinances you would know what they would be. In this case we would take our instructions from the engineer.

Q. You would not know what the engineer intended to design for the theatre?

A. He would not get very far out of the way. The drawings have not all been prepared, but those that have been prepared are an indication of the whole, and they are my only information except the general drawings that I saw on one visit to San Francisco, in Mr. Shea's office. They gave me a general impression of the whole work.

Q. But no designs as far as the theatre was concerned was ever prepared?

A. No detailed drawings.

This concluded the testimony and the foregoing constitutes all the evidence in the case. [216]

[Instructions Requested by Defendant.]

Prior to the closing of the evidence in said case and before the argument to the jury began, defendant duly requested the Court, in writing, to give to the jury the following instructions:

Instructions numbered I as follows:

I instruct you that inasmuch as it appears from the evidence that the drawings were a material part of the contract and were never completed that the contract is void and therefore your verdict must be for the defendant.

Instruction II as follows:

In its third amended complaint on file plaintiff alleges that on the 19th day of January, 1907, a contract was made with the defendant whereby plaintiff agreed to deliver to defendant F. O. B. cars, San Francisco, California, at \$77 per ton the quantity of structural steel and iron required by plans and specifications for the Columbia Theatre Building, recited in said alleged contract, which quantity plaintiff estimates at approximately 1500 tons and plaintiff says that by the terms of the contract plaintiff agreed to deliver all such material to the defendant before September first, 1907.

I instruct you that unless plaintiff has established to your satisfaction by a preponderance of evidence, the existence of a contract containing all those substantial terms, to wit: the plans and specifications, the character of the work to be done, the price, the

quantity to be delivered and the time of delivery, and in addition to that, established by the same preponderance of evidence that plaintiff's cost in carrying out the contract was less than the contract price, your verdict must be for the defendant.

Instruction III as follows:

It is the duty of the plaintiff to establish by a preponderance of the evidence the complete cost to plaintiff of the performance of this contract. Unless it has done so there is no evidence upon which you may base any verdict as to the amount of damages sustained by plaintiff.

Instruction IV as follows:

You are not to guess at the amount of such costs, nor to enter the realm of speculation, for the burden of proving such costs is upon plaintiff, and if you are unable to find from the evidence the cost of performing the alleged contract and every item of plaintiff's expenses in such performance or if you are unable to conclude from the facts which are established to your satisfaction by a preponderance of the evidence what would have been the cost to plaintiff in the performance of said alleged contract, then your verdict should be for the defendant because the plaintiff, in that event, has not established by a preponderance of the evidence, the facts which are essential to a verdict in its favor. [217]

Instruction V as follows:

In a case of this kind there are two distinct items as the ground of damages. FIRST: What has already been expended towards performance, less the value of the materials on hand, purchased for this

particular work. SECOND. The profits that plaintiff would have realized by the performance of the whole contract.

The second item, profits, cannot always be recovered. They may be too remote and speculative in their character and therefore incapable of that clear and direct proof which the law requires.

Instruction VI as follows:

If it is possible for you to satisfy yourself by a preponderance of the evidence of the cost to plaintiff of the performance of this contract, then before you may render a verdict as to the amount of damages it sustained, if any, you must determine from a preponderance of evidence, what deduction should be made from the contract price for the time saved by plaintiff in the performance of the contract, its release from care, trouble, risk and responsibility attending a full execution of the contract; unless you are able to determine from the evidence what amount plaintiff saved in these circumstances, your verdict must be for the defendant.

Instruction VII as follows:

If there is omitted from the evidence, elements of expense which plaintiff would have incurred had the contract been performed, or elements showing the amount plaintiff saved by not devoting all the time that would have been required in the performance of the contract and release from the risk of performance, then your verdict should be for the defendant.

Instruction VIII as follows:

In determining plaintiff's cost in performing said alleged contract, allowance must be made for every

item of cost and expense attending a full compliance with any performance of, said alleged contract, and in estimating any profits which plaintiff claims it would have made in performing said contract you must, of course, exclude all such as are merely speculative and conjectural.

Instruction IX as follows:

If you find that a contract has been established with all its essential terms, then when plaintiff ceased to perform the contract, its expense ceased; its plant became free to be used in other ventures and was no longer employed in this and if it is impossible to ascertain from the evidence what plaintiff saved on the general cost of completing the alleged contract by not being required to perform it, then the evidence is insufficient and too speculative for you to base any just and legal verdict thereon, as to the possible profits plaintiff would have earned or damages it would have sustained. [218]

Instruction X as follows:

If you should find by a preponderance of the evidence that there was a contract between the plaintiff and the defendant it was nevertheless, the duty of the plaintiff not to allow its plant to remain idle, but to use every reasonable effort to procure other work and if it did not procure other work to take the place of the work mentioned in said contract, during the time it would be employed in the performance of this contract, you should deduct the amount of profits made by the plaintiff on such other work from any sum you may find it is entitled to under the facts of this case.

Instruction XI as follows:

The burden of proof in this case is upon the plaintiff. It does not devolve upon the defendant to show that the plaintiff was not damaged by the alleged breach of contract, or if so damaged the amount of those damages. But it devolves upon the plaintiff in order to prevail to establish by a preponderance of the evidence that the alleged breach of contract in fact damaged plaintiff and the amount of such damages.

Instruction XII as follows:

If the evidence leaves you in doubt as to whether or not plaintiff was damaged by the breach of contract, or as to the amount of the damages, your verdict must be for the defendant.

Instruction XIII as follows:

In no instance are you to conjecture or surmise that plaintiff would have profited by the performance of the contract. If no facts are disclosed to you by a preponderance of the evidence which establish that the plaintiff would have profited by the performance of the contract and the amount of such profits, your verdict must be for the defendant.

Instruction XIV as follows:

The direct evidence of one witness who is entitled to full credit is sufficient for proving any fact in this case. The evidence upon which your verdict should be based must be satisfactory evidence and that evidence only is satisfactory which produces moral certainty in an unprejudiced mind. You are not to guess at whether or not there was a contract, if any nor guess at the amount of damages plaintiff sus-

tained, if any nor should you enter into the realm of speculation for the burden of proving such facts is upon the plaintiff. If you are unable to find from the evidence that there was a contract, or if you find there was a contract, but you are unable to find from the evidence the amount of damages plaintiff sustained, if any, your verdict must be for the defendant. If the evidence upon any of these questions is equally balanced your verdict must also be for the defendant.

If, after a careful consideration of all the evidence you are not able to conclude from the facts which are established that there was a contract, or if you conclude that there was a contract but that the damages claimed are too [219] speculative or remote, your verdict should be for the defendant because in none of these instances has the plaintiff established by a preponderance of evidence the facts which are essential to a verdict in its favor.

Instruction XV as follows:

The law in this case, and indeed in every case, is that a party coming into a court of justice must satisfy the jury by what is called a preponderance of evidence as to the justice of his claim; what we mean by a preponderance of evidence is this: We cannot get a pair of scales, and by some arbitrary method put on one side the testimony of plaintiff and on the other side the testimony of defendant and say which outweighs the other, or whether it is evenly balanced, but you are to try to do that mentally as far as possible.

The law says that unless the plaintiff satisfies you

throughout the entire case of the correctness of his story to such an extent that it outweighs the proof of the defendants he cannot recover. In other words, if the testimony is evenly balanced, it shows that there is some doubt in your mind; that it is not sufficient; that is, if the testimony of the plaintiff weighs just the same as that of the defendant, you must find for the defendant, that is the law. The plaintiff can only recover where his testimony outweighs that of the defendant.

Thereupon the case was argued to the jury and upon the closing of the argument of the Court instructed the jury as follows:

[Instructions.]

The COURT.—Ordinarily, I would not submit the case to you at this hour, but we are rather short of jurors on the panel, and I may need your services in another case in the morning. It strikes me that this case is a very simple one, not only in its facts, but in regard to the law, and I have an idea that you will be able to reach a verdict without difficulty and without remaining out over night, or any considerable period into the night. My hesitation about submitting a case to the jury late in the day is that possibly they might get tied up and have to stay out all night. I know that is very unpleasant, but I do not apprehend any such result will follow in this case, so I will submit the case to you now. Give me your attention.

This is an action brought by the plaintiff to recover from the defendant the damages alleged to have been suffered by it through the breach by de-

fendant of a contract for the [220] fabrication and delivery of structural steel. With the nature and terms of that contract you have been made familiar and I need not recite them. There is, under the evidence, substantially but one question left for your determination in reaching a verdict, and that is as to the amount of damages, if any, plaintiff has suffered through the breach of the contract sued on.

Counsel for the defendant in his argument concedes that the plaintiff is entitled to some damages, but the amount is in controversy. While the making of the contract and its breach by the defendant are both denied in the answer, the evidence shows without any conflict whatsoever that the contract was duly executed between the parties as alleged. It is true that it does not appear that the specifications, or detail drawings for all the steel to be furnished under it had been completed by the architect, but it does appear without controversy that those specifications were so far completed as that both parties treated the contract as ready for execution to the extent the specifications and drawings had been furnished, and that plaintiff, at the direction and request of defendant, had entered upon its execution, so that, for all purposes affecting the rights of the parties here involved, the contract is to be regarded as having been duly executed. As to the alleged breach of the contract by the defendant, the action of the defendant, as disclosed by the correspondence between the parties, and which is wholly uncontroverted, directing the stopping of all work under the contract and stating that the contemplated structure had been aban-

done, justified plaintiff in treating the contract as at an end, and constituted in law a breach of the contract by defendant. You would not be justified, therefore, under the evidence, in finding against either the execution of the contract by the parties, or its breach by the defendant as counted upon. [221]

This leaves, as I have said, but one substantive question for your consideration, and that is the question of damages.

The rule or measure of damages which may be recovered for the breach of a contract such as this is the difference between the consideration stipulated to be paid under the contract for its performance, and the cost of such performance. That is to say, under the contract in suit, the damages plaintiff will be entitled to at your hands, is the difference between the agreed price per ton for the quantity of structural steel which you may find from the evidence would have been required to complete the contemplated building in its entirety as provided in the contract, less what you may find it would have cost the plaintiff to have completed the fabrication and delivery of such entire quantity of steel; in other words, the plaintiff is entitled to the agreed price per ton of the entire quantity of material covered by the contract to be furnished by it, less what it would have cost it to deliver it free on board the cars in San Francisco in a fabricated state, with interest and so forth. That interest I would suggest to you will be at the legal rate of seven per cent under the law of this State.

The question of the amount of damages plaintiff

has suffered, being in controversy, the burden is upon the plaintiff to establish the amount of such damages by satisfactory evidence, that is, by evidence which produces moral certainty in your mind as unprejudiced persons, and when there is any conflict in the evidence it must preponderate in favor of the plaintiff, that is, the evidence should, in your judgment, be to some extent stronger in favor of plaintiff than that which is against it. Preponderance of evidence does not mean the greater number of witnesses, for you are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, as against a less number, or other evidence satisfying your minds. [222] The direct evidence of one witness who is entitled to full faith and credit is sufficient to prove any fact in a case such as this.

The evidence on behalf of plaintiff should be such as to enable the jury to determine with reasonable certainty, first, what the probable expense or cost would have been to the plaintiff to have performed the contract in its entirety, this to be determined from the different elements of cost involved in the work as disclosed in the testimony; and secondly, the probable gross quantity of steel, in tons, it would have required to complete the building. Thereupon, by taking the total cost to plaintiff of fabricating and delivering the material, and deducting it from the gross sum produced by multiplying the number of tons of steel you find it would have taken to complete the building by the price per ton fixed in the contract, that is, \$77, the difference or result will be

the profit which plaintiff would have made on the contract, and which would represent the damages which, under the law, it would be entitled to recover.

In figuring the cost to plaintiff of fabricating the steel in question, the fixed and regular monthly salaries paid by plaintiff to its permanent officers and heads of departments, without regard to this particular work, should not be taken into account unless you find that such item of general expense in plaintiff's business would have been increased by reason of plaintiff having to carry out the entire contract; but the jury should include in the items of cost such amount as they find would be a proper allowance for wear and tear on the machinery in plaintiff's plant had the entire work contemplated by the contract been done at such plant.

The evidence should be such as to enable you to determine the different elements which I have referred to as entering into the question of damages, with reasonable certainty; mathematical certainty is not required, but such degree of certainty as will enable the jury to reach approximately just results.

You will understand, as stated, that reasonable certainty [223] in the respect mentioned is all that is required; plaintiff is not called upon to prove his case to a demonstration. The evidence is all before you, and it is for your consideration alone. It is the duty of the Court to state the law, and by that the jury are bound, but the facts are to be found by the jury as to all questions about which there is any conflict or controversy; and with that function it is not the province of the Court to interfere.

You must be certain, however, that your verdict is based upon the evidence, and is not the result of arbitrary desire, on the one hand, or of surmise or speculation on the other.

The Clerk has prepared forms of verdict for you, gentlemen of the jury, which you will make out in this case as indicated to you by my instructions. When you have reached a conclusion you will report to the Court. As it has been suggested, the plaintiff will be entitled to some verdict at your hands, so the other form of verdict which the clerk has drawn up will not be required, and all that it will be necessary for you gentlemen to do is to fill in the amount of damages which you may find in favor of the plaintiff. You will bear in mind that in the Federal court the verdict of the jury must be unanimous, and cannot be by a less number as in the State Courts. You may now retire, gentlemen of the jury.

The above charge and instructions were the only instructions given to the jury. [224]

Before the case was submitted to the jury and before its retirement, the following proceedings took place:

[Exceptions to Instructions Given and Refused, etc.]

Mr. HUMPHREY.—All instructions given by the Court of its own motion, all instructions requested by the defendant and refused, and all instructions given by the Court at the request of the plaintiff are deemed excepted to, are they not?

The COURT.—We do not follow that practice here, but if you think that applies here, all right.

Mr. HUMPHREY.—That will be the general ex-

ception that we take as given by the statute of the State. We except to all instructions given at the request of the plaintiff, all instructions given by the Court of its own motion, and all instructions requested by the defendant and refused or modified by the Court.

The COURT.—You will have to take your chances on that. I don't know that that applies in this Court. You may retire, however, gentlemen. If that is the idea of counsel, all right.

Mr. HUMPHREY.—That is the exception we desire to take.

Which said exceptions are hereby designated as Defendant's Exceptions Nos. 11 to 33, both inclusive.

Recital Re Verdict, etc.

Thereupon after the Court charged the jury it retired and deliberated and returned a verdict in favor of plaintiff in the sum of \$17,372; and upon said verdict judgment was entered against said defendant and in favor of plaintiff in said sum and for costs amounting to \$——.

AND, NOW, IN FURTHERANCE OF JUSTICE, defendant presents the foregoing as its Bill of Exceptions in this case and prays that the same may be settled and allowed and signed and certified to as provided by law.

LENT & HUMPHREY,
Attorneys for Defendant. [225]

**[Stipulation Re Presentation of Bill of Exceptions,
etc.]**

The settlement of the foregoing Bill of Exceptions having been regularly continued to the present term,

it is hereby stipulated and agreed that said Bill of Exceptions may be presented to the Judge who tried the above-entitled case, and settled, certified and allowed.

Dated February 7th, 1913.

WRIGHT & WRIGHT & STETSEN,

Attorneys for Plaintiff.

LENT & HUMPHREY,

Attorneys for Defendant.

Order Settling Bill of Exceptions.

The settlement of the foregoing Bill of Exceptions having been regularly continued to the present term of Court and said Bill of Exceptions being now presented in due time and found to be correct, the same is hereby settled, certified and allowed as a true Bill of Exceptions taken upon the trial of the above-entitled action.

Dated February 7th, 1913.

WM. C. VAN FLEET,

Judge of said Court.

[Endorsed]: Filed Feb. 7, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [226]

In the District Court of the United States, Northern District of California, Second Division.

Formerly in the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 14,716.

MODERN STEEL STRUCTURAL COMPANY, a
Corporation,

Plaintiff,

vs.

AMERICAN-PACIFIC CONSTRUCTION COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

American-Pacific Construction Company, a corporation, defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment thereupon entered in favor of the said plaintiff on the 18th day of September, 1912, whereby it was adjudged that the plaintiff recover of and from the defendant the sum of \$17,372.00 and its costs, taxed at the sum of two hundred twenty-eight and 70/100 dollars, comes now by Messrs. W. F. Humphrey and Lent & Humphrey, its attorneys, and petitions said Court for an order allowing it, said defendant, American-Pacific Construction Company, a corporation, to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals in and for the Ninth Circuit, under and according to the laws of the United States in that

behalf made and provided; and also, that an order be made fixing the amount of security for costs which the defendant shall give and furnish upon said writ of error.

And your *petition* will *every* pray.

Dated March 15, 1913.

AMERICAN-PACIFIC CONSTRUCTION
COMPANY,

By W. F. HUMPHREY,

Its Attorney.

W. F. HUMPHREY and

LENT & HUMPHREY,

Attorneys for American-Pacific Construc-
tion Company. [227]

[Endorsed]: Filed March 15, 1913. W. B. Mal-
ing, Clerk. [228]

*In the District Court of the United States, Northern
District of California, Second Division.*

*Formerly in the Circuit Court of the United States,
Ninth Judicial Circuit, Northern District of
California.*

No. 14,716.

MODERN STEEL STRUCTURAL COMPANY,
a Corporation,

Plaintiff,

vs.

AMERICAN-PACIFIC CONSTRUCTION COM-
PANY, a Corporation,

Defendant.

Assignment of Errors.

Comes now American-Pacific Construction Company, a corporation, the defendant in the above-entitled action, by Messrs. Lent & Humphrey, its attorneys, and files the following as the errors upon which it will rely upon its prosecution of the writ of error in the above-entitled cause:

I.

That the District Court of the United States, Ninth Circuit, in and for the Northern District of California, erred in overruling the objection of counsel for defendant (plaintiff in error) to the following question asked by counsel for plaintiff of the witness, Samuel B. Harding: "Mr. Harding, state whether or not the Modern Steel Structural Company had a written contract with the American-Pacific Construction Company, defendant, with reference to furnishing a quantity of structural steel for the building known as the Columbia Theatre of San Francisco. To which question the witness replied, "It did." BEING EXCEPTION NO. 1.

II.

That the said Court erred in overruling the objection of [229] counsel for defendant (plaintiff in error) to the introduction in evidence at the trial of said cause of a certain proposal which purports to be a proposal by the Modern Steel Structural Company, dated Waukesha, Wisconsin, January 4, 1907, to the American-Pacific Construction Company, whereby said Modern Steel Structural Company proposes to furnish the structural steel and iron and

reinforcing steel (except the grillage beams, bolts, separators and column bases mentioned on page 3 of specifications referred to in said proposal) for the Richelieu Syndicate Theatre and Office Building known as the Columbia Theatre, location southeast corner of Van Ness Avenue and Geary Street, San Francisco, California, being Plaintiff's Exhibit "K," and which was and is in exactly the following words and figures, to wit:

"Modern Steel Structural Co.

Waukesha, Wis., Jan. 4, 1907.

American-Pacific Construction Co., San Francisco, Cali.

We propose to furnish you in good order the following described structural material, constructed in a workmanlike manner, described as follows and in accordance with drawings furnished by Jos. D. Smedberg and specifications also furnished by J. D. Smedberg, identified with marks:

'Copy #1,' initialed, 'S. B. H. 12/30/06,' excepting as noted under 'REMARKS' on sheet #2 attached.

Namely, the structural steel and iron, and re-enforcing steel, (except the grillage beams, bolts, separators and column bases mentioned on page 3 of specifications referred to above) for the Richelieu Syndicate Theatre and Office Building, known as the Columbia Theatre; location southeast corner of Van Ness Ave. & Geary St., San Francisco, Cali.

Delivery as follows: That portion indicated by Mr. Smedberg, shown within red lines on blue-prints 3-S, 4-S, 7-S, dated by us [230] on back of print as

received Dec. 31st, 1906, and 8-S dated by us on back of print as received Jan. 3, 1907, required to begin erection of steel work on stores, to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg.

Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved detail drawings, signed by Mr. Smedberg.

REMARKS: Our proposition is based on the substitution in part (as referring to 'KIND, CHARACTER AND FINISH OF MATERIALS,' beginning page 9, and 'INSPECTION' beginning page 11 of the above specifications) of Manufacturers' Standard Specifications as found in Carnegie's Hand Book.

Mill Test Reports, within said specifications, are proposed, as being satisfactory in the above respects to Mr. Smedberg, and upon his request stating upon which portions of the work he will require such reports, we will comply therewith by furnishing same.

Price to be Seventy-seven Dollars (\$77.00) per ton; freight allowed to San Francisco, Cali. Correct figured weights of steel to govern amount of sale and all steel work to be accepted at our works by Mr. Smedberg, or his authorized agent.

Terms of payment as follows: 30 days net cash from date of invoices.

Payable in New York, Chicago or Milwaukee Exchange, free of expense to us for the collection charges.

We are responsible for shop errors in work not erected by ourselves and for alterations, whether

erected by ourselves or not, only when notified of same in writing before correction is made and given an opportunity and reasonable time to suggest remedy or to ourselves make alterations.

When delays are caused to our men by materials or labor not furnished by us, you agree to pay their time, at our regular rates, [231] and their expenses, while so delayed.

This contract is contingent upon our ability to procure material from the mill, delays of carriers and upon strikes, accidents or other delays unavoidable or beyond our reasonable control.

It is expressly agreed that there are no promises, agreements or understandings outside of this contract and that no agent or salesman has any authority to obligate the Modern Steel Structural Company by any terms, stipulations or conditions not herein expressed.

The title and right of possession to all materials we furnish remains with the Modern Steel Structural Company until the same has been fully paid for in cash.

This proposition is for immediate acceptance, but although accepted, does not constitute a contract until approved by an executive officer of the Modern Steel Structural Company, and is subject to change or withdrawal until so approved.

MODERN STEEL STRUCTURAL CO.

By _____,

Approved by _____.

Accepted _____, 190_____.

_____,
_____.”

And in admitting the same in evidence. BEING EXCEPTION NO. 2.

III.

That the said Court erred in overruling the objection of counsel for said defendant (plaintiff in error) to the following question asked by counsel for plaintiff of the witness, Samuel B. Harding: "Does it indicate the acceptance of the contract?" to which question witness replied, "It indicates that I, on receipt of that letter and enclosure, gave the job a number, and contract as it were, through which it would be known in our plant by number. That is the custom whenever we receive an accepted contract, to at once give it a number." BEING EXCEPTION NO. 3. [232]

IV.

That the said Court erred in overruling the objection of counsel for defendant to the introduction in evidence at the trial of said cause of certain specifications made by Frank T. Shay, Architect, San Francisco, and Joseph D. Smedberg, Consulting Engineer, San Francisco, which purported to be specifications for the structural steel and iron of an eight story office building and theatre to be erected on the Southeast corner of Van Ness Avenue and Geary Street, for the Richelieu Syndicate, San Francisco, Cal., being Plaintiff's Exhibit "M," and in admitting the same in evidence. BEING EXCEPTION NO. 4.

V.

That the said Court erred in overruling the objection of counsel for said defendant (plaintiff in error) to the introduction in evidence at the trial

of said cause, of certain detail drawings, consisting of 31 sheets, on tracing cloth, made by the Modern Steel Structural Company, which purported to be detail drawings for a part of the structural steel work for said Columbia Theatre Building, being Plaintiff's Exhibit "A," "B," etc., and annexed to Defendant's Bill of Exceptions and marked Exhibit "A," and in admitting the same in evidence. BEING EXCEPTION NO. 5.

VI.

That the Court erred in overruling the objection of counsel for said defendant (plaintiff in error) to the following question asked by counsel for plaintiff of the witness, Samuel B. Harding: Now, Mr. Harding, I will ask you if at all times during the months of March, April, May and June, 1907, the plaintiff stood ready and willing to carry out the contract with the defendant?" to which question the witness replied, "It did." BEING EXCEPTION NO. 6. [233]

VII.

That the said Court erred in refusing to grant the motion of counsel for said defendant (plaintiff in error) to strike out the following portion of the answer of the witness, Samuel B. Harding: "And my reasons for that statement would be this: The American-Pacific Construction Company, through Mr. Vigus, talked of 1400 tons; the architect and his engineer talked of 14 or 1500 tons, as I remember it; now, the architect's plans—I am speaking now of the original plans from which we made our detail drawings—were incomplete at the time we began work,

and Mr. Smedberg came up for the purpose of completing these drawings, and in so far as we went in examining the original drawings prepared by the architect, we found a number of places where they were not up to the ordinances, and that was the occasion of our writing our letter of March 26, marked Exhibit "O," calling attention to the discrepancies, and I, therefore, from such investigations and discrepancies found, think that the building would run up to the 1500 ton mark, if not more, as these increases spoken of are 20 per cent or 25 per cent. Of course, this would not apply to all the structure." The question propounded to the witness was: "But 1500 tons at least according to these specifications?" To this question the witness answered, "Yes," and proceeded as before stated. BEING EXCEPTION NO. 7.

VIII.

That the said Court erred in overruling the objection of counsel for said defendant (plaintiff in error) to the following question asked by counsel for plaintiff of the witness, Frederick Hoffman: "From your examination of the drawings and specifications of the building, in your judgment, what quantity of structural steel was required to carry out the plans and specifications for the Columbia Theatre Building in question?" to which question the witness replied, "In my judgment it would take in the [234] neighborhood of 1500 tons." BEING EXCEPTION NO. 8.

IX.

The Court erred in sustaining the objection of

counsel for plaintiff to the following question asked by counsel for defendant (plaintiff in error) of the witness, Thomas Vigus: "With whom did you have that conversation?" It was admitted that the conversation sought to be elicited was had with S. B. Harding, the President of the Plaintiff Company. BEING EXCEPTION NO. 9.

X.

That the said Court erred in denying the motion of counsel for defendant (plaintiff in error) for a judgment of nonsuit and dismissal. Said motion was made on the following grounds:

1. That there is a failure of proof in the following particulars:

a. It is not shown by the evidence that there has been a completed contract; on the contrary, the evidence shows that the contract is incomplete and imperfect in this:

That the proposal which is set forth in the evidence here and date the 4th day of January, 1907, states that the defendant was to furnish certain structural steel, in accordance with drawings and specifications to be furnished by Joseph Smedberg, which were identified with certain marks. It affirmatively appears from the evidence that those drawings have never been made nor furnished.

2. There is a variance in this: The contract alleged required the plaintiff to deliver to defendant at San Francisco the fabricated steel on or before the 1st day of September, 1907, while the contract placed in evidence by plaintiff required delivery to be made within sixty or ninety days after completion

of the detailed drawings.

3. There is a variance in this: The contract alleged [235] states that there was an agreed tonnage of 1500 tons of steel to be furnished, while the contract placed in evidence shows there was no agreed tonnage.

4. The action is premature inasmuch as the contract offered in evidence provides: "In case any difference of opinion shall arise between the parties to this contract in relation to the contract, the work to be, or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract, and these two shall have the power to name an uninterested umpire, whose decision shall be binding on all parties to the contract." From the evidence it appears that there was no arbitration, and therefore the action is premature.

5. There is no evidence of damages. The attempt to show loss of profits or damages failed. There is absolutely no evidence of the costs, hence there is no way of determining any damages, except by guesswork. BEING EXCEPTION NO. 10.

XI.

That the Court erred in refusing to give the jury the following instruction as required by the defendant:

Instruction Numbered I, as follows:

"I instruct you that inasmuch as it appears from the evidence that the drawings were a material part of the contract and were never completed, that the contract is void and therefore your verdict must be

for the defendant."

XII.

That the Court erred in refusing to give the jury the following instruction as requested by the defendant (plaintiff in error):

Instruction II, as follows:

"In its third amended complaint on file, plaintiff alleges: That on the 19th day of January, 1907, a contract was made with [236] the defendant whereby plaintiff agreed to deliver to defendant f. o. b. cars, San Francisco, California, at \$77 per ton the quantity of structural steel and iron required by plans and specifications for the Columbia Theatre Building, recited in said alleged contract, which quantity plaintiff estimates at approximately 1500 tons, and plaintiff says that by the terms of the contract plaintiff agreed to deliver all such material to the defendant before September first, 1907."

"I instruct you that unless plaintiff has established to your satisfaction by a preponderance of evidence the existence of a contract containing all those substantial terms, to wit, the plans and specifications, the character of the work to be done, the price, the quantity to be delivered and the time of delivery, and in addition to that, established by the same preponderance of evidence that plaintiff's cost in carrying out the contract was less than the contract price, your verdict must be for the defendant."

XIII.

That the Court erred in refusing to give the jury the following instruction as requested by the defendant (plaintiff in error):

Instruction III, as follows:

“It is the duty of the plaintiff to establish by a preponderance of the evidence the complete cost to plaintiff of the performance of this contract. Unless it has done so there is no evidence upon which you may base any verdict as to the amount of damage sustained by plaintiff.”

XIV.

That the Court erred in refusing to give the jury the following instruction as requested by the defendant (plaintiff in error):

Instruction IV, as follows:

“You are not to guess at the amount of such costs, nor to enter into the realm of speculation, for the burden of proving [237] such costs is upon plaintiff, and if you are unable to find from the evidence the cost of performing the alleged contract and every item of plaintiff’s expenses in such performance, or if you are unable to conclude from the facts which are established to your satisfaction by a preponderance of the evidence what would have been the cost to plaintiff in the performance of said alleged contract, then your verdict should be for the defendant, because the plaintiff, in that event, has not established by a preponderance of the evidence, the facts which are essential to a verdict in its favor.”

XV.

That the Court erred in refusing to give the jury the following instruction as requested by the defendant (plaintiff in error):

Instruction V, as follows:

“In a case of this kind, there are two distinct items as the ground of damages. FIRST: What has already been expended towards performance, less the value of the materials on hand, purchased for this particular work. SECOND: The profits that plaintiff would have realized by the performance of the whole contract.

“The second item, profits, cannot always be recovered. They may be too remote and speculative in their character and therefore incapable of that clear and direct proof which the law requires.”

XVI.

That the Court erred in refusing to give the jury the following instruction as requested by the defendant (plaintiff in error):

Instruction VI, as follows:

“If it is possible for you to satisfy yourself by a preponderance of the evidence of the cost to plaintiff of the performance of this contract, then before you may render a verdict as to the amount of damages it sustained, if any, you must determine from a preponderance of evidence what deduction should be made from [238] the contract price for the time saved by plaintiff in the performance of the contract, its release from care, trouble, risk and responsibility attending a full execution of the contract; unless you are able to determine from the evidence what amount plaintiff saved in these circumstances, your verdict must be for the defendant.”

XVII.

That the Court erred in refusing to give the jury

the following instruction as requested by the defendant (plaintiff in error):

Instruction VII, as follows:

“If there is omitted from the evidence, elements of expense which plaintiff would have incurred had the contract been performed, or elements showing the amount plaintiff saved by not devoting all the time that would have been required in the performance of the contract and release from the risk of performance, then your verdict should be for the defendant.”

XVIII.

That the Court erred in refusing to give the jury the following instruction as requested by the defendant (plaintiff in error):

Instruction VIII, as follows:

“In determining plaintiff’s cost in performing said alleged contract, allowance must be made for every item of cost and expense attending a full compliance with any performance of said alleged contract, and in estimating any profits which plaintiff claims it would have made in performing said contract, you must, of course, exclude all such as are merely speculative and conjectural.” [239]

XIX.

That the Court erred in refusing to give the jury the following instruction as requested by defendant (plaintiff in error):

Instruction IX, as follows:

“If you find that a contract has been established with all its essential terms, then when plaintiff ceased to perform the contract, its expense ceased;

its plant became free to be used in other ventures and was no longer employed in this, and if it is impossible to ascertain from the evidence what plaintiff saved on the general cost of completing the alleged contract by not being required to perform it, then the evidence is insufficient and too speculative for you to base any just and legal verdict thereon, as to the possible profits plaintiff would have earned or damages it would have sustained.

XX.

That the Court erred in refusing to give the jury the following instruction as requested by the defendant (plaintiff in error):

Instruction X, as follows:

“If you should find by a preponderance of the evidence that there was a contract between the plaintiff and the defendant, it was nevertheless the duty of the plaintiff not to allow its plant to remain idle, but to use every reasonable effort to procure other work, and if it did not procure other work to take the place of the work mentioned in said contract, during the time it would be employed in the performance of this contract, you should deduct the amount of profits made by the plaintiff on such other work from any sum you may find it is entitled to under the facts of this case.” [240]

XXI.

That the Court erred in refusing to give the jury the following instruction as requested by the defendant (plaintiff in error):

Instruction XI, as follows:

“The burden of proof in this case is upon the plain-

tiff. It does not devolve upon the defendant to show that the plaintiff was not damaged by the alleged breach of contract, or if so damaged, the amount of those damages. But it devolves upon the plaintiff in order to prevail to establish by a preponderance of the evidence that the alleged breach of contract in fact damaged plaintiff and the amount of such damages.”

XXII.

That the Court erred in refusing to give the jury the following instruction as requested by the defendant (plaintiff in error):

Instruction XII, as follows:

“If the evidence leaves you in doubt as to whether or not plaintiff was damaged by the breach of contract, or as to the amount of the damages, your verdict must be for the defendant.”

XXIII.

That the Court erred in refusing to give the jury the following instruction as requested by the defendant (plaintiff in error):

Instruction Number XIII, as follows:

“In no instance are you to conjecture or surmise that plaintiff would have profited by the performance of the contract. If no facts are disclosed to you by a preponderance of the evidence which establish that the plaintiff would have profited by the performance of the contract and the amount of such profits, your verdict must be for the defendant.” [241]

XXIV.

That the Court erred in refusing to give the jury the following instruction as requested by the de-

fendant (plaintiff in error):

Instruction XIV, as follows:

“The direct evidence of one witness who is entitled to full credit is sufficient for proving any fact in this case. The evidence upon which your verdict should be based must be satisfactory evidence and that evidence only is satisfactory which produces moral certainty in an unprejudiced mind. You are not to guess at whether or not there was a contract, if any, nor guess at the amount of damages plaintiff sustained, if any, nor should you enter into the realm of speculation for the burden of proving such facts is upon the plaintiff. If you are unable to find from the evidence that there was a contract, or if you find there was a contract, but you are unable to find from the evidence the amount of damages plaintiff sustained, if any, your verdict must be for the defendant. If the evidence upon any of these questions is equally balanced your verdict must also be for the defendant.

“If, after a careful consideration of all the evidence you are not able to conclude from the facts which are established that there was a contract, or if you conclude that there was a contract, but that the damages claimed are too speculative or remote, your verdict should be for the defendant because in none of these instances has the plaintiff established by a preponderance of evidence the facts which are essential to a verdict in its favor.”

XXV.

That the Court erred in refusing to give the jury the following instruction as requested by the de-

fendant (plaintiff in error):

Instruction XV, as follows:

“The law in this case, and indeed in every case, is that a party coming into a court of justice must satisfy the jury by [242] what is called a preponderance of evidence as to the justice of his claim; what we mean by a preponderance of evidence is this: we cannot get a pair of scales, and by some arbitrary method put on one side the testimony of plaintiff, and on the other side the testimony of defendant, and say which outweighs the other, or whether it is evenly balanced, but you are to try to do that mentally as far as possible.

“The law says that unless the plaintiff satisfies you throughout the entire case of the correctness of his story to such an extent that it outweighs the proof of the defendants, he cannot recover. In other words, if the testimony is evenly balanced, it shows that there is some doubt in your mind; that it is not sufficient; that is, if the testimony of the plaintiff weighs just the same as that of the defendant, you must find for the defendant, that is the law. The plaintiff can only recover where his testimony outweighs that of the defendant.”

XXVI.

That the Court erred in giving the following instruction during the course of the charge to the jury:

“This is an action brought by the plaintiff to recover from the defendant the damages alleged to have been suffered by it through the breach by defendant of a contract for the fabrication and delivery of structural steel. With the nature and terms of

that contract you have been familiar and I need not recite them. There is, under the evidence, substantially but one question left for your determination in reaching a verdict, and that is as to the amount of damages, if any, plaintiff has suffered through the breach of the contract sued on."

XXVII.

That the Court erred in giving the following instruction during the course of the charge to the jury:

"Counsel for the defendant in his argument concedes that the [243] plaintiff is entitled to some damages, but the amount is in controversy. While the making of the contract and its breach by the defendant are both denied in the answer, the evidence shows without any conflict whatsoever, that the contract was duly executed between the parties as alleged. It is true that it does not appear that the specifications or detail drawings for all the steel to be furnished under it had been completed by the architect, but it does appear without controversy that those specifications were so far completed as that both parties treated the contract as ready for execution to the extent the specifications and drawings had been furnished, and that plaintiff, at the direction and request of defendant had entered upon its execution, so that, for all purposes affecting the rights of the parties herein involved, the contract is to be regarded as having been duly executed. As to the alleged breach of the contract by the defendant, the action of the defendant, as disclosed by the correspondence between the parties, and which is wholly uncontroverted, directing the stopping of all

work under the contract and stating that the contemplated structure had been abandoned, justified plaintiff in treating the contract as at an end, and constituted in law a breach of the contract by defendant. You would not be justified, therefore, under the evidence, in finding against either the execution of the contract by the parties, or its breach by the defendant as counted upon.”

XXVIII.

That the Court erred in giving the following instruction during the course of the charge to the jury:

“This leaves, as I have said, but one substantive question for your consideration, and that is the question of damages.”

“The rule or measure of damages which may be recovered for the breach of a contract such as this, is the difference between [244] the consideration stipulated to be paid under the contract for its performance, and the cost of such performance. That is to say, under the contract in suit, the damages plaintiff will be entitled to at your hands, is the difference between the agreed price per ton for the quantity of structural steel which you may find from the evidence would have been required to complete the contemplated building in its entirety as provided in the contract, less what you may find it would have cost the plaintiff to have completed the fabrication and delivery of such entire quantity of steel; in other words, the plaintiff is entitled to the agreed price per ton of the entire quantity of material covered by the contract to be furnished by it, less what it would have cost it to deliver it free on board the cars in

San Francisco in a fabricated state, with interest and so forth. That interest I would suggest to you will be at the legal rate of seven per cent under the law of this State."

XXIX.

That the Court erred in giving the following instruction during the course of the charge to the jury:

"The question of the amount of damages plaintiff has suffered being in controversy, the burden is upon the plaintiff to establish the amount of such damages by satisfactory evidence; that is, by evidence which produces moral certainty in your minds as unprejudiced persons, and when there is any conflict in the evidence, it must preponderate in favor of the plaintiff, that is, the evidence should, in your judgment, be to some extent stronger in favor of plaintiff than that which is against it. Preponderance of evidence does not mean the greater number of witnesses, for you are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, as against a less number, or other evidence satisfying [245] your minds. The direct evidence of one witness who was entitled to full faith and credit is sufficient to prove any fact in a case such as this."

XXX.

That the Court erred in giving the following instruction during the course of the charge to the jury:

"The evidence on behalf of plaintiff should be such as to enable the jury to determine with reasonable certainty, first, that what the probable expense

or cost would have been to the plaintiff to have performed the contract in its entirety, this to be determined from the different elements of cost involved in the work as disclosed in the testimony; and secondly, the probable gross quantity of steel, in tons, it would have required to complete the building. Thereupon, by taking the total cost to plaintiff of fabricating and delivering the material, and deducting it from the gross sum produced by multiplying the number of tons of steel you find it would have taken to complete the building by the price per ton fixed in the contract, that is, \$77.00, the difference or result will be the profit which plaintiff would have made on the contract, and which would represent the damages which, under the law, it would be entitled to recover.”

XXXI.

That the Court erred in giving the following instruction during the course of the charge to the jury:

“In figuring the cost to plaintiff of fabricating the steel in question, the fixed and regular monthly salaries paid by plaintiff to its permanent officers and heads of departments, without regard to this particular work, should not be taken into account unless you find that such item of general expense in plaintiff’s business would have been increased by reason of plaintiff having to carry out the entire contract; but the jury should include in the items of cost such amount as they find would be a [246] proper allowance for wear and tear on the machinery in plaintiff’s plant had the entire work contemplated by the contract been done at such plant.”

XXXII.

That the Court erred in giving the following instruction during the course of the charge to the jury:

“The evidence should be such as to enable you to determine the different elements which I have referred to as entering into the question of damages with reasonable certainty; mathematical certainty is not required, but such degree of certainty as will enable the jury to reach approximately just results.”

“You will understand, as stated, that reasonable certainty in the respect mentioned is all that is required. Plaintiff is not called upon to prove his case to a demonstration. The evidence is all before you, and it is for your consideration alone. It is the duty of the Court to state the law, and by that the jury are bound, but the facts are to be found by the jury as to all questions about which there is any conflict or controversy; and with that function it is not the province of the Court to interfere.

“You must be certain, however, that your verdict is based upon the evidence, and is not the result of arbitrary desire, on the one hand, or of surmise or speculation on the other.”

XXXIII.

That the Court erred in giving the following instruction during the course of the charge to the jury:

The Clerk has prepared forms of verdict for you, gentlemen of the jury, which you will make out in this case as indicated to you by my instructions. When you have reached a conclusion, you will report to the Court. As it has been suggested, the plaintiff will be entitled to some verdict at your hands, so

the other [247] form of verdict which the clerk has drawn up will not be required, and all that it will be necessary for you gentlemen to do is to fill in the amount of damages which you may find in favor of the plaintiff. You will bear in mind that in the Federal Court the verdict of the jury must be unanimous, and cannot be by a less number as in the State Courts. You may now retire, Gentlemen of the Jury."

XXXIV.

That the Court erred in refusing to give the instructions proposed by the defendant above set forth, and numbered Instruction I to XV, both inclusive, and in giving the instructions hereinabove set forth in paragraphs XXVI to XXXIII hereof, both inclusive, being Exceptions 11 to 33, both inclusive.

XXXV.

That the Court erred in refusing to give any of the instructions proposed by the defendants above set forth and numbered Instructions I to XV, both inclusive, and in giving the instruction hereinabove set forth in Paragraph XXVI to XXXIII hereof, both inclusive, being Exceptions 11 to 33, both inclusive.

XXXVI.

That the Court erred in permitting the plaintiff to file its second amended complaint.

XXXVII.

That the Court erred in overruling the demurrer of defendant to plaintiff's second amended complaint.

WHEREFORE, the said defendant prays that the

judgment in favor of plaintiff herein against the defendant be reversed and that the said District Court of the United States in and for the Northern District of California, be directed to grant a new trial [248] in said cause.

Dated March 15, 1913.

AMERICAN-PACIFIC CONSTRUCTION
COMPANY.

By W. F. HUMPHREY,
W. F. HUMPHREY and
LENT and HUMPHREY,

Attorneys for American-Pacific Construction Com-
pany, Plaintiff in Error and Defendant in the
Court Below.

[Endorsed]: Filed March 15, 1913. W. B. Maling,
Clerk. [249]

*In the District Court of the United States, Northern
District of California, Second Division.*

*Formerly in the Circuit Court of the United States,
Ninth Judicial Circuit, Northern District of
California.*

No. 14,716.

MODERN STEEL STRUCTURAL COMPANY,
a Corporation,

Plaintiff,

vs.

AMERICAN-PACIFIC CONSTRUCTION COM-
PANY, a Corporation,

Defendant.

Order Allowing Writ of Error [and Fixing Amount of Bond].

Upon motion of W. F. Humphrey and Messrs. Lent & Humphrey, attorneys for defendant in the above-entitled action, and upon the filing of the petition for Writ of Error and Assignment of Errors.

IT IS HEREBY ORDERED that a Writ of Error as prayed for in said petition be allowed and that the amount of the cost undertaking or bond to be given by the defendant upon said Writ of Error be and the same is hereby fixed at the sum of five hundred dollars.

Dated March 15th, 1913.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed March 15, 1913. W. B. Maling,
Clerk. [250]

*In the District Court of the United States, Northern
District of California, Second Division.*

*Formerly in the Circuit Court of the United States,
Ninth Judicial Circuit, Northern District of
California.*

No. 14,716.

MODERN STEEL STRUCTURAL COMPANY,
a Corporation,

Plaintiff,

vs.

AMERICAN-PACIFIC CONSTRUCTION COM-
PANY, a Corporation,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, AMERICAN-PACIFIC CONSTRUCTION COMPANY, a corporation, as principal, and THE AETNA ACCIDENT AND LIABILITY COMPANY, a corporation, of Hartford, Connecticut, as surety, are jointly and severally held and firmly bound unto the plaintiff in the above-entitled action in the sum of Five Hundred (500) Dollars, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and each of our successors, representatives and assigns firmly by these presents.

SEALED with our seals and dated this 15th day of March, 1913.

AND, WHEREAS, the above-named defendant is about to sue out a Writ of Error in the United States Circuit Court of Appeals in and for the Ninth Circuit, to reverse the judgment entered in the above-entitled action in favor of the plaintiff therein and against the defendant therein, and awarding judgment in favor of the plaintiff therein for the sum of \$17,372.00, and costs taxed at \$227.70 dollars.

NOW, THEREFORE, the condition of this obligation is such that if the above-named defendant, AMERICAN-PACIFIC CONSTRUCTION COMPANY, [251] a corporation, shall prosecute such Writ of Error to effect and answer all costs if it shall fail to make good its plea, then this obligation shall

be void; otherwise to remain in full force and effect.

[Seal Aetna Accident & Liability Co.]

THE AETNA ACCIDENT AND LIABILITY COMPANY.

SHIRLEY M. JOHNSON,

Attorney in Fact.

AMERICAN-PACIFIC CONSTRUCTION
COMPANY, a Corporation,

By ALFRED L. MEYERSTEIN,

Pres.

And by WILLIAM F. HUMPHREY,

Its Attorney.

The foregoing bond is hereby approved this 15th
day of March, 1913.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Mar. 15, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [252]

*In the District Court of the United States, Northern
District of California, Second Division.*

*Formerly in the Circuit Court of the United States,
Ninth Judicial Circuit, Northern District of
California.*

No. 14,716.

MODERN STEEL STRUCTURAL COMPANY,
a Corporation,

Plaintiff,

vs.

AMERICAN-PACIFIC CONSTRUCTION COM-
PANY, a Corporation,

Defendant.

Stipulation and Order Allowing Withdrawal of Exhibits.

It is hereby stipulated and agreed that by and between the parties hereto as follows:

FIRST. That Exhibits "A," "B," and "C," attached to defendant's original Engrossed Bill of Exceptions on file in the above-entitled action, being true copies of the detailed drawings, tracing drawings and material list made by the plaintiff and offered and received in evidence at the trial of said action by the said plaintiff, need not be copied in or made a part of the transcript of record, but that the Exhibits "A," "B" and "C" attached to said Engrossed Bill of Exceptions, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit and be received and considered by said Court as fully as if copies of said Exhibits "A," "B" and "C" had been inserted in said transcript of record.

Dated March 20, 1913.

WRIGHT & WRIGHT & STETSON,

Attorneys for Plaintiffs.

LENT & HUMPHREY,

Attorneys for Defendant.

It is so ordered.

WM. C. VAN FLEET,

Judge. [253]

[Endorsed]: Filed Mar. 21, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [254]

[**Certificate of Clerk U. S. District Court to Transcript of Record, etc.**]

In the District Court of the United States, Northern District of California.

No. 14,716.

MODERN STEEL STRUCTURAL COMPANY, a
Corporation,

Plaintiff,

vs.

AMERICAN-PACIFIC CONSTRUCTION COMPANY, a Corporation,

Defendant.

I, Walter B. Maling, Clerk of the District Court of the United States of America, in and for the Northern District of California, do hereby certify the foregoing two hundred and fifty-four (254) pages, numbered from 1 to 254, inclusive, to be and full, true and correct copy of the record and proceedings in the above and therein entitled cause, excepting therefrom exhibits "A," "B," and "C" attached to the bill of exceptions (which by stipulation and order of the Court are allowed to be withdrawn and transmitted herewith as a part of this record), as the same remains of record and on file in the office of the Clerk of said District Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing record on writ of error is \$154.60; that said amount was paid by the attorneys for the defendant, and that

the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 10th day of May, A. D. 1913.

[Seal]

WALTER B. MALING,
Clerk United States District Court. [255]

[Original Writ of Error.]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Greeting:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between AMERICAN-PACIFIC CONSTRUCTION COMPANY, a corporation, Plaintiff in Error, and MODERN STEEL STRUCTURAL COMPANY, a corporation, Defendant in Error, a manifest error hath happened to the great damage of the said AMERICAN-PACIFIC CONSTRUCTION COMPANY, a corporation, Plaintiff in Error, as by its complaint appears;

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things

concerning the same, to the UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 14th day of April, 1913, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM C. VAN FLEET, Judge of the United States District Court, the 15th day of March, in the year of our Lord One Thousand Nine Hundred and Thirteen.

[Seal]

W. B. MALING,

Clerk of the District Court of the United States for the Northern District of California.

By J. A. Schaertzer,

Deputy Clerk.

Allowed:

WM. C. VAN FLEET,

Judge. [256]

Service of within writ by copy admitted this 15th day of March, 1913.

WRIGHT & WRIGHT & STETSEN,

Attorneys for Plaintiff (Defendant in Error).

[Endorsed]: No. 14,716. In the United States District Court, Ninth Judicial Circuit, Northern District of California. Modern Steel Structural Company, a Corporation, vs. American-Pacific Construction Company, a Corporation. Writ of Error.

Filed March 17, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [257]

Return to Writ of Error.

The answer of the Judges of the District Court of the United States in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,

Clerk. [258]

[Original Citation on Writ of Error.]

UNITED STATES OF AMERICA.—ss.

The President of the United States, to Modern Steel Structural Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 14th day of April, 1913, being within thirty days from the date hereof, pursuant to a Writ of Error, filed in the clerk's office of the District Court of the United States, for the Northern District of California, Second Division, wherein American-Pacific Construction Company, a corporation, is plaintiff in error and

you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 15th day of March, A. D. 1913.

WM. C. VAN FLEET,
United States District Judge. [259]

Service of within Citation, by copy, admitted this 15th day of March, A. D. 1913.

WRIGHT & WRIGHT & STETSEN,
Attorneys for Plaintiff (Defendant in Error).

[Endorsed]: No. 14,716. In the District Court of the United States for the Ninth Circuit, Northern District of California. Modern Steel Structural Company, a Corporation, vs. American-Pacific Construction Company, a Corporation. Citation. Filed March 17th, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2272. United States Circuit Court of Appeals for the Ninth Circuit. American-Pacific Construction Company, a Corporation, Plaintiff in Error, vs. Modern Steel Structural Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States

District Court of the Northern District of California, First Division.

Filed May 12, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

AMERICAN-PACIFIC CONSTRUCTION COM-
PANY, a Corporation,
Plaintiff in Error,

vs.

MODERN STEEL STRUCTURAL COMPANY, a
Corporation,
Defendant in Error.

**Order Extending Time to [May 12, 1913] to File
Record on Writ of Error and to Docket Case.**

Good cause appearing therefor, it is hereby ordered that the time within which plaintiff in error may file the record on writ of error in the above-entitled case and docket the case with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, shall be enlarged to and including the 12th day of May, A. D. 1913.

WM. C. VAN FLEET,
Judge.

[Endorsed]: No. 2272. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to ————— to File Record Thereof and to Docket Case. Filed Apr. 11, 1913. F. D. Monekton, Clerk. Refiled May 12, 1913. F. D. Monekton, Clerk.

[Stipulation and Order Providing That Original Exhibits "A," "B," and "C" Need not be Printed, etc.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

AMERICAN-PACIFIC CONSTRUCTION COMPANY, a Corporation,

Plaintiff in Error,

vs.

MODERN STEEL STRUCTURAL COMPANY, a Corporation,

Defendant in Error.

WHEREAS, pursuant to a stipulation entered into between the attorneys for the above-named plaintiff in error and defendant in error and the order of Hon. William C. Van Fleet, Judge of the District Court of the United States, Northern District of California, Second Division, dated March 20, 1913, the original exhibits, "A," "B" and "C," attached to defendant's (plaintiff in error) original engrossed bill of exceptions on file in the said District Court of the United States, Northern District of California, Second Division, being true copies of the detailed drawings, tracing drawings and material list, made by the plaintiff (defendant in error), and

which plaintiff (defendant in error) offered and had admitted in evidence at the trial of said action in said District Court of the United States, Northern District of California, Second Division, were transmitted by the Clerk of said District Court of the United States for the Northern District of California, Second Division, to the said United States Circuit Court of Appeals for the Ninth Circuit, for its inspection and use during the hearing of the above-entitled action, and were filed in the Clerk's Office of this Court on the 12th day of May, 1913:

NOW, THEREFORE, it is hereby stipulated and agreed that said exhibits "A," "B" and "C" need not be printed by the Clerk of the above-entitled court in the printed transcript of record of said cause, and that said exhibits "A," "B" and "C" may be used by said United States Circuit Court of Appeals for the Ninth Circuit for its inspection and use during the hearing and determination of the above-entitled cause by the said United States Circuit Court of Appeals for the Ninth Circuit in the same manner and to the same extent as if said exhibits "A," "B," and "C" were printed in the printed transcript of the record of said cause by the Clerk of the above-entitled court.

Dated May 22, 1913.

WILLIAM F. HUMPHREY,
LENT & HUMPHREY,

Attorneys for Plaintiff in Error.

WRIGHT & WRIGHT & STETSEN,
SENECA N. TAYLOR,

Attorneys for Defendant in Error.

Pursuant to the foregoing stipulation, it is hereby ordered that the original exhibits "A," "B" and "C" attached to defendant's bill of exceptions on file in the above-entitled action in the District Court of the United States, Northern District of California, Second Division, which were transmitted to and filed in this Court by the Clerk of said District Court of the United States, Northern District of California, Second Division, on the 12th day of May, 1913, need not be printed by the Clerk of this Court in the printed transcript of record of said cause, and that said original exhibits "A," "B" and "C" may be used and inspected by this Court during the hearing and determination of the above-entitled cause by this Court, in the same manner and to the same extent as if said exhibits "A," "B," and "C" were printed in the printed transcript of record of said cause, by the clerk of this Court.

Dated May 22, 1913.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals
for the Ninth Circuit.

[Endorsed]: No. 2272. In the United States Court of Appeals for the Ninth Circuit. American-Pacific Construction Company, a Corporation, Plaintiff in Error, vs. Modern Steel Structural Company, a Corporation, Defendant in Error. Stipulation and Order Under Rule 23. Filed May 23, 1913. F. D. Monckton, Clerk.

No. 2272

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN-PACIFIC CONSTRUCTION
COMPANY (a corporation),
Plaintiff in Error,

vs.

MODERN STEEL STRUCTURAL COM-
PANY (a corporation),
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

WILLIAM F. HUMPHREY,
Attorney for Plaintiff in Error.

LENT & HUMPHREY,
Of Counsel.

Filed this.....day of October, 1913.

FILED

OCT 20 1913

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2272

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN-PACIFIC CONSTRUCTION
COMPANY (a corporation),

Plaintiff in Error,

vs.

MODERN STEEL STRUCTURAL COM-
PANY (a corporation),

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

I.

Statement of the Case.

This is an action at law for damages for an alleged breach of contract. The defendant in error had judgment in the lower court for \$17,372 as alleged damages.

The facts of the case may be briefly summarized as follows:

Shortly after the San Francisco disaster of April 18, 1906, "The Richlieu Realty Syndicate," a Cali-

fornia corporation, leased the premises in the City and County of San Francisco, known as the southeast corner of Geary Street and Van Ness Avenue and decided to erect thereon an eight-story *combined office building and theatre* (Tr. p. 106). The American-Pacific Construction Company (plaintiff in error), a California corporation, was organized in the latter part of the year 1906, for the purpose, generally, of erecting buildings, but not *for the fabrication of, or the erection of* the steel members that entered into the construction of a building. The Modern Steel Structural Company (defendant in error) is and for many years prior to the year 1906, was, and ever since has been, a Wisconsin corporation, organized for the special purpose of manufacture, fabrication and erection of steel structures of all kinds, with its plant at Waukesha, Wisconsin (Tr. pp. 75-76). S. B. Harding, president of the Modern Steel Structural Company (defendant in error), was in San Francisco when "The Richlieu Realty Syndicate" was seeking bids for the structural steel and iron work required for its proposed building. He was then counselling the American-Pacific Construction Company to open a structural steel shop at San Francisco and promised to aid it in establishing such shop by interesting himself in it and sending men to operate the plant (Tr. p. 80; p. 92). It was then suggested that the plaintiff in error bid for the steel work on the Richlieu Realty Syndicate Building and sublet the contract to the defendant in error. It was argued that the plaintiff in error, a local concern,

would probably have more chance than the defendant in error. Mr. Harding, president of the defendant in error, knew that the plaintiff in error was unfamiliar with the steel business and offered to and did plan the contract which plaintiff in error was to propose to the Richlieu Realty Syndicate (Tr. p. 84; p. 85; bottom page 86, and p. 87; p. 90; p. 91; p. 96). The proposition as planned by Mr. S. B. Harding was submitted to "The Richlieu Realty Syndicate" and accepted (Tr. p. 84). The first acceptance was verbally given on or about the 22nd day of December, 1906 (Tr. p. 82).

Early in January, 1907, the Modern Steel Structural Company sent to the plaintiff in error, for its acceptance, a proposal in the following words:

"PROPOSAL FROM MODERN STEEL STRUCTURAL CO.

Waukesha, Wis., Jan. 4, 1907.

American-Pacific Construction Co.,

San Francisco, Cal.

We propose to furnish you in good order the following described structural material, constructed in a workmanlike manner, described as follows and in accordance with the *drawings furnished by Jos. D. Smedberg* AND *specifications also furnished by J. D. Smedberg*, identified with marks: 'Copy #1' Initialed, 'S. B. H. 12-30-06' excepting as noted under 'remarks' on sheet #2 attached.

Namely, the structural steel and iron (except the grillage beams, bolts, separators, and column bases mentioned on page 3, of specifications referred to above) for the Richlieu Realty Syndicate Theatre and Office Building, known as the Columbia Theatre; Location—Southeast corner of Van Ness & Geary St., San Francisco, Cali.

Delivery: as follows: *That portion indicated by Mr. Smedberg, shown within red lines on blue prints 3-S, 4-S, 7-S, dated by us on back of print as received Dec. 31, 1906, and 8-S dated by us on back of print as received Jan. 3, 1907, required to begin erection of steel work on stores to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg.*

Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg.

REMARKS: Our proposition is based on the substitution in part (as referring to '*kind, character and finish of materials*' beginning page 9 and '*inspection*' beginning page 11 of the above specifications) of Manufacturers' Standard Specifications as found in Carnegie's Hand Book.

Mill Test Reports, within said specifications are proposed, as being satisfactory in the above respects to Mr. Smedberg, and upon his request stating upon which portions of the work he will require such reports, we will comply therewith by furnishing same.

We also agree that the tonnage is to be determined and paid for by certificates from the Western Weighing Association at the point of shipment. It is understood that the AMERICAN-PACIFIC CONSTRUCTION COMPANY, at their own expense, will weigh same at the Public Scales in San Francisco, and should they prove that the weights so certified by the Western Weighing Association at point of shipment are not correct, we hereby agree to reimburse the AMERICAN-PACIFIC CONSTRUCTION COMPANY, the amount overpaid us.

Price to be Seventy-seven dollars (\$77.00) per ton; Freight allowed to San Francisco, Cali. Correct figured weights of steel to govern amount of sale and all steel work to be accepted

at our works by Mr. Smedberg, or his authorized agent.

Terms of payment as follows: 30 days net cash from date of invoices.

Payable in New York, Chicago or Milwaukee Exchange, free of Expense to us for the collection charges.

We are responsible for shop errors in work not erected by ourselves and for alterations, whether erected by ourselves or not, only when notified of same in writing before correction is made and given an opportunity and reasonable time to suggest remedy or to ourselves make alterations.

When delays are caused to our men by material or labor not furnished by us, you agree to pay their time, at our regular rates and their expenses, while so delayed.

This contract is contingent upon our ability to procure material from the mills, delays of carriers and upon strikes, accidents or other delays unavoidable or beyond our reasonable control.

It is expressly agreed that there are no promises, agreements of understandings outside of this contract and that no agent or salesman has any authority to obligate the MODERN STEEL STRUCTURAL COMPANY by any terms, stipulations or conditions not herein expressed.

The title and right of possession to all material we furnish remains with the MODERN STEEL COMPANY until the same has been fully paid for in Cash.

This proposition is for immediate acceptance, but although accepted does not constitute a contract until approved by an executive officer of the Modern Steel Structural Company, and is subject to change or withdrawal until so approved.

In case any differences of opinion shall arise between the parties to this contract in relation

to the contract, the work to be or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract and these two shall have the power to name an uninterested umpire whose decision shall be binding on all parties to the contract.

Ship Via:

MODERN STEEL STRUCTURAL Co.,
Accepted Jany. 17th, 1907. By S. B. H.
Approved by S. B. Harding, Pres.
AMERICAN-PACIFIC CONSTRUCTION Co.,
Thomas Vigus, General Manager."

Here it is essential to note that the drawings referred to in said proposal were never, *even to this day*, completed (Tr. pp. 108, 165, 255), and without them there was no means of ascertaining the tonnage of steel in the proposed building, except by *guess work*, and that the specifications were not attached to the alleged proposal or contract. The proposal was signed and returned to defendant in error about January 15, 1907 (Tr. p. 102).

On the first of March, 1907, defendant in error shipped from Waukesha, Wisconsin, to plaintiff in error thirty-nine and one quarter ($39\frac{1}{4}$) tons of fabricated steel of the value of \$3021.09. This is the only steel fabricated or shipped by defendant in error under the said proposal (Tr. p. 231).

On April 8, 1907, for the first time it became apparent to the plaintiff in error that the Richlieu Realty Syndicate was a financial wreck and unable to carry out its contract and plaintiff in error immediately telegraphed defendant in error to stop all

work, and later advised defendant in error that the Richlieu Realty Syndicate was hopelessly insolvent and had abandoned the contract (Tr. p. 20; p. 132; p. 133; p. 137). When it was beyond question that the Richlieu Realty Syndicate was unable to carry out and had abandoned the contract plaintiff in error on the 13th day of April, 1907, telegraphed defendant in error (Modern Steel Structural Company) to wire its outside figure in full settlement of the alleged contract (Tr. p. 135). No reply was received and on the 15th day of April, 1907, the plaintiff in error wrote asking the outside cost and asking defendant in error in fixing the cost to remember that plaintiff in error, independent of this contract, would sustain a heavy loss (Tr. p. 137). In reply defendant in error asked \$30,230 as damages caused by the cancellation of an alleged contract, the total amount to be paid on full performance of which was, according to defendant in error only \$115,500 (Tr. p. 138; p. 46). In other words, it claimed damages in the sum of \$30,230 for the non-fulfillment of a contract, which, if fulfilled required the payment only of \$115,500. Defendant in error attempted to justify its claims for damages in several different ways, every one of which finds its sole support in *speculation* and *guessing*.

By its letter of May 28, 1907, the items of the alleged damages are specified as follows:

Material as per accompanying 4 sheets— weight—275,481 lbs. at \$1.90 unloaded in our yard	\$ 5234.14
Car of steel invoiced	3021.09
<i>Expenses and money advanced J. D. Smedberg</i>	350.00
Shop Drawings	1441.53
UNUSED SHOP SPACE LYING IDLE	20,183.24
	<hr/>
Total	\$30,230.00
(Tr. p. 149).	

J. D. Smedberg was *the representative of the Richlieu Realty Syndicate and of its architect* (Tr. pp. 104, 127, 223). Yet money loaned to him was charged against plaintiff in error as part of the alleged damages.

By its letter of the 15th of October, 1907, defendant in error wrote that the above figures were made up “somewhat hurriedly” (request for them was made April 22, 1907 (Tr. p. 140) and they were furnished by letter dated May 28, 1907,—thirty-six days later—(Tr. p. 149), and, therefore the figures given under date of May 28, 1907, were more or less approximate. But by October 15, 1907, it had ample time to consider its damages and to detail the items making up the total sum of \$30,931.23 which was its new appraisalment of its damage (Tr. p. 211). In this appraisalment it added to the actual cost of raw material and the cost of fabrication various percentage of such cost as part of its “overhead expenses”

that should be chargeable to this alleged contract (Tr. pp. 211, 216, especially 214).

Another appraisalment was made in its first complaint in which it fixed its damages at \$30,881.23 (Tr. p. 10).

A fourth appraisalment is made in its second complaint and the total amount is fixed at \$35,164.17 (Tr. p. 147).

Mr. S. B. Harding, president of the defendant in error, gives the fifth appraisalment of the alleged damage and fixes it at \$34,470.00 (Tr. p. 156). And although the "overhead expenses" of the defendant in error amounting to \$7171.23 monthly (Tr. p. 164) were not included as part of the cost in this estimate, and they were included in all other estimates, the total damages seems to pivot about the mystical \$30,000.

F. W. Harding, vice-president of the defendant in error, offers the sixth estimate of the damage sustained by the defendant in error by breach of the alleged contract and fixes it at \$29,637.00 (Tr. bottom page 186). He did not include in his estimate of the cost of performing the alleged contract, the share of the "overhead expenses" chargeable to this contract (Tr. p. 187).

The president of the defendant in error and (Tr. p. 156) its vice-president (Tr. p. 186) testified to the amount of damage, and its secretary gave his estimate in writing (Tr. pp. 211-216). There was absolutely no agreement among them on the cost of per-

forming the contract, or in any particular, except in the amount of damage. Each guessed an amount in the neighborhood of \$30,000; notwithstanding that, on January 25, 1907, the defendant in error, through it president wrote:

"If you desire to buy the job elsewhere and not give the \$77.00, we would be very much pleased to relieve you, only asking you to pay us what we have already done" (Tr. p. 189); and

again on the 31st day of January, 1907, before the alleged breach of contract, the same president wrote in effect that there was no profit in the alleged contract with the plaintiff in error:

"We felt in the whole transaction that we were more carrying out the obligations made by F. G. Harding, of Los Angeles, than anything else, as we were so filled up with work and the writer further said that we would be pleased if we could sublet it to someone and get out EVEN and at the same time serve you, but if we could not, we were going to stick by and fill the order."

These circumstances and unconsciousable claim of damages indicate that the defendant in error intended to take advantage of the "inexperience" in (Tr. p. 85) and the "unfamiliarity" of plaintiff in error (Tr. pp. 86-87) with steel work and probably explains why defendant in error wrote plaintiff in error on the 31st of December, 1906, "You will have to put yourself in our hands to do the right thing by you * * *" (Tr. p. 91).

The questions raised on this writ or error relate to the following propositions:

1. The proposal of the defendant in error and its alleged acceptance by the plaintiff in error did not constitute a valid, or any, contract, because:

(a) It was incomplete as it proposed to furnish all the structural steel required for a building to be constructed in accordance with drawings to be furnished by Joseph D. Smedberg, which drawings were never made and therefore there was no means of knowing or determining the quantity of steel to be furnished.

(b) Although the purpose was to furnish all the structural steel shown by drawings and specifications to be furnished by Joseph D. Smedberg, neither drawings nor specifications were ever attached to, nor made part of said proposal and neither the drawings nor the specifications were ever completed. Therefore, it was impossible for either party to know the quantity of steel to be fabricated; the manner in which it was to be fabricated; or the size, form, weight, or appearance of the various steel members entering into said building, or the cost of fabricating the same.

(c) The said alleged contract is uncertain and indefinite inasmuch as it does not show, nor in any manner indicate the amount of steel to be fabricated or the size (long, short, broad, or narrow) weight, (light or heavy,) form, appearance, or style into which the various steel members of the proposed

building were to be fabricated. Therefore, the defendant in error never could fabricate the steel for a building—the drawings and design for which were never furnished; until they were finished even the architect of the proposed building could not describe any of its members, although in his mind he had formed a conception of its exterior design.

2. There was no proof of damage, except of the amount actually expended by the defendant in error in part performance of the alleged contract, to wit: the sum of \$3021.09. Even if the alleged proposal and acceptance constitute a valid contract, there is absolutely no evidence of damage, except in the sum of \$3021.09, the amount spent in part performance of the contract, all other damages being based on purely speculation and guess work. The proposal was too indefinite to establish a sufficient predicate for fixing specific or any damages.

3. There was a variance between the contract alleged and the one sought to be proved, in the following particulars:

(a) It was alleged that the contract was for an agreed amount of steel, to wit: 1500 tons. The testimony shows simply a proposal to furnish the structural steel required for the Columbia Theatre Building and shown by the drawings and specifications to be furnished by Joseph D. Smedberg and no such plans were ever prepared or furnished.

(b) The contract alleged provided delivery of all fabricated steel at San Francisco, on or before Sep-

tember 1, 1907, at \$77.00 per ton, f. o. b. San Francisco; while the testimony offered to sustain an alleged contract for steel at \$77.00 per ton, freight allowed to San Francisco and deliveries to be made as follows:

“That portion indicated by Mr. Smedberg shown within red lines on blue prints 3-S, 4-S, 7-S, dated by us on back of print as received Dec. 31, 1906, and 8-S, dated by us on back of print as received, Jan. 3, 1907, required to begin the erection of steel work on stores to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg.

Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg.”

4. The action is premature, if the contract is valid, then any difference concerning it or the work done, must be settled by arbitration. The defendant in error has never arbitrated the dispute involved in this action. This clause was inserted by the defendant and is a condition precedent to its right of action.

Question one (1) above is raised on exceptions:

(a) To the ruling of the court admitting in evidence the proposal of defendant in error, dated January 4, 1907, and being plaintiff's Exhibit “K” and plaintiff's Exhibit No. 3 (Tr. p. 99).

(b) To the ruling of the court in allowing witness, Samuel B. Harding's answer, over objection

by plaintiff in error, the following question: "Does it indicate the acceptance of the contract" (Tr. p. 104).

(c) To the ruling of the court admitting in evidence over the objections of plaintiff in error certain alleged incomplete specifications, made by Frank T. Shay and Joseph D. Smedberg and marked Exhibit "M" (Tr. p. 105).

(d) To the ruling of the court in admitting in evidence over the objections of the plaintiff in error certain 31 sheets of detail drawings (Tr. p. 125).

(e) To the ruling of the court allowing the witness Samuel B. Harding, over the objections of plaintiff in error, to answer the question "Now, Mr. Harding, I will ask you if at all times during the months of March, April, May and June, 1907, the plaintiff stood ready and willing to carry out the contract with the defendant?" (Tr. p. 128.)

(f) To the ruling of the court refusing to grant the motion of counsel for plaintiff in error to strike out the following answer of witness Samuel B. Harding "And my reasons for that statement would be this: The American Pacific Construction Company, through Mr. Vigus, talked of 1400 tons; the architect and his engineer talked of 14 or 1500 tons as I remember. Now the architect's plans—I am speaking now of the original plans from which we made our detail drawings—*were incomplete at the time we began work*, and Mr. Smedberg came up for the purpose of completing these drawings and

insofar as we went in examining the original drawings prepared by the architect we found a number of places where they were not up to the ordinances, and that was the occasion of our writing our letter of March 26, marked Exhibit "O" calling attention to the discrepancies and I, therefore, from such investigations and discrepancies found, think that the building would run up the 1500 ton mark, if not more, and these increases spoken of are 20 per cent or 25 per cent. Of course this would not apply to all the structure (Tr. pp. 130-131).

(g) To the ruling of the court in allowing witness Frederick Hoffman, over the objection of counsel for defendant (plaintiff in error) to answer the following question: "From your examination of the drawings and specifications of the building in your judgment, what quantity of structural steel was required to carry out the plans and specifications for the Columbia Theatre Building in question?" (Tr. p. 177).

(h) To the ruling of the court denying the motion for non-suit made by counsel for defendant (plaintiff in error) (Tr. pp. 231-232).

(i) To the refusal of the court to instruct as a matter of law that as the drawings which were a material part of the contract were never completed the contract was void and the verdict must be for the defendant (Tr. p. 281).

(j) To the refusal of the court to instruct the jury that unless the plaintiff established by a pre-

ponderance of evidence the following elements, to-wit: the existence of a contract, containing plans and specifications; the character of the work to be done, the price, the quantity to be delivered and time of delivery and that the cost to plaintiff in carrying out such a contract was less than the contract price, the verdict must be for the defendant (Tr. p. 281).

(k) To the refusal of the court to instruct as a matter of law, as follows:

The direct evidence of one witness who is entitled to full credit is sufficient for proving any fact in this case. The evidence upon which your verdict should be based must be satisfactory evidence and that evidence only is satisfactory which produces moral certainty in an unprejudiced mind. You are not to guess at whether or not there was a contract, if any, nor guess at the amount of damages plaintiff sustained, if any, nor should you enter into the realm of speculation, for the burden of proving such facts is upon the plaintiff. If you are unable to find from the evidence that there was a contract, or if you find there was a contract, but you are unable to find from the evidence the amount of damages plaintiff sustained, if any, your verdict must be for the defendant. If the evidence upon any of these questions is equally balanced your verdict must also be for the defendant.

If, after a careful consideration of all the evidence you are not able to conclude from the facts

which are established that there was a contract or if you conclude that there was a contract but that the damages claimed are too speculative or remote, your verdict should be for the defendant, because in none of these instances has the plaintiff established by a preponderance of evidence the facts which are essential to a verdict in its favor (Tr. p. 287).

(1) To the refusal of the court to instruct as a matter of law, as follows:

The law in this case, and indeed in every case, is that a party coming into a court of justice must satisfy the jury by what is called a preponderance of evidence as to the justice of his claim; what we mean by a preponderance of evidence is this: we cannot get a pair of scales, and by some arbitrary method put on one side the testimony of plaintiff and on the other side the testimony of defendant and say which outweighs the other, or whether it is evenly balanced but you are to try to do that mentally as far as possible.

The law says that unless the plaintiff satisfies you throughout the entire case of the correctness of his story to such an extent that it outweighs the proof of the defendant's he cannot recover. In other words, if the testimony is evenly balanced, it shows that there is some doubt in your mind; that it is not sufficient; that is, if the testimony of the plaintiff weighs just the same as that of the defendant, you must find for the defendant, that is the law. The

plaintiff can only recover when his testimony outweighs that of the defendant (Tr. p. 288).

(m) To the instruction of the court to the effect that there was under the evidence but one question left for the jury to determine in reaching a verdict and that is the amount of damages plaintiff suffered through the breach of contract sued on (Tr. pp. 288-289).

(n) To the instruction of the court given as follows:

Counsel for the defendant in his argument concedes that the plaintiff is entitled to damages, but the amount is in controversy. While the making of the contract and its breach by the defendant are both denied in the answer the evidence shows without any conflict whatsoever, that the contract was duly executed between the parties as alleged. It is true that it does not appear that the specifications or detail drawings for all the steel to be furnished under it had been completed by the architect, but it does appear without controversy that those specifications were so far completed as that both parties treated the contract as ready for execution to the extent the specifications and drawings had been furnished and that plaintiff at the direction and request of defendant had entered upon its execution so that, for all purposes affecting the rights of the parties herein involved, the contract is to be regarded as having been duly executed, as to the alleged breach of the contract by the defendant,

the action of the defendant as disclosed by the correspondence between the parties and which is wholly uncontroverted, directing the stopping of all work under the contract and stating that the contemplated structure had been abandoned, justified plaintiff in treating the contract as at an end and constituted in law a breach of the contract by defendant. You would not be justified, therefore, under the evidence in finding against either the execution of the contract by the parties or its breach by the defendant as counted upon (Tr. pp. 289-290).

Question 2 above is raised on exceptions

(a) Same as are specified as being raised by question I.

(b) To the ruling of the court sustaining the objection of counsel for plaintiff (defendant in error) to question asked Thomas Vigus, to wit: "With whom did you have that conversation?" (Tr. p. 181).

(c) To the ruling of the court denying the motion for nonsuit made by counsel for defendant (plaintiff in error) (Tr. pp. 231-232).

(d) To the refusal of the court to instruct as a matter of law, as follows:

In its third amended complaint on file plaintiff alleges: that on the 19th day of January, 1907, a contract was made with the defendant whereby plaintiff agreed to deliver f. o. b. cars San Francisco, California, at \$77 per ton the quantity of

structural steel and iron required by plans and specifications for the Columbia Theatre Building, recited in said alleged contract, which quantity plaintiff estimates at approximately 1500 tons, and plaintiff says that by the terms of the contract plaintiff agreed to deliver all such material to the defendant before September first, 1907.

I instruct you that unless plaintiff has established to your satisfaction by a preponderance of evidence the existence of a contract containing all those substantial terms, to wit: the plans and specifications, the character of the work to be done, the price, the quantity to be delivered and the time of delivery, and in addition to that, established by the same preponderance of evidence that plaintiff's cost in carrying out the contract was less than the contract price, your verdict must be for the defendant (Tr. p. 281).

(e) To the ruling of the court in refusing to instruct as a matter of law, as follows:

It is the duty of the plaintiff to establish by a preponderance of the evidence the complete cost to plaintiff of the performance of this contract. Unless it has done so, there is no evidence upon which you may base any verdict as to the amount of damage sustained by plaintiff (Tr. p. 282).

(f) To the ruling of the court in refusing to instruct as a matter of law, as follows:

You are not to guess at the amount of such costs nor to enter into the realm of speculation,

for the burden of proving such costs is upon plaintiff and if you are unable to find from the evidence the cost of performing the alleged contract and every item of plaintiff's expenses in such performance, or if you are unable to conclude from the facts which are established to your satisfaction by a preponderance of the evidence what would have been the cost to plaintiff in the performance of said alleged contract, then your verdict should be for the defendant, because the plaintiff, in that event has not established by a preponderance of the evidence, the facts which are essential to a verdict in its favor (Tr. p. 282).

(g) To the ruling of the court in refusing to instruct as a matter of law, as follows:

In a case of this kind, there are two distinct items as the ground of damages: *First*. What has already been expended towards performance, less the value of the materials on hand purchased for this particular work. *Second*. The profits that plaintiff would have realized by the performance of the whole contract.

The second item, profits, cannot always be recovered. They may be too remote and speculative in their character and therefore incapable of that clear and direct proof which the law requires (Tr. p. 283).

(h) To the ruling of the court in refusing to instruct as a matter of law, as follows:

If it is possible for you to satisfy yourself by a preponderance of the evidence of the cost to plaintiff of the performance of this contract, then before you may render a verdict as to the amount of damages it sustained, if any, you must determine from a preponderance of the evidence what deduction should be made from the contract price for the time saved by plaintiff in the performance of the contract, its release, from care, trouble, risk and responsibility attending a full execution of the contract; unless you are able to determine from the evidence what amount plaintiff saved in the circumstances your verdict must be for the defendant (Tr. p. 283).

(i) To the ruling of the court in refusing to instruct as a matter of law, as follows:

If there is omitted from the evidence elements of expense which plaintiff would have incurred had the contract been performed, or elements showing the amount plaintiff saved by not devoting all the time that would have been required in the performance of the contract and released from the risk of performance then your verdict should be for the defendant (Tr. p. 284).

(j) To the ruling of the court in refusing to instruct as a matter of law, as follows:

In determining plaintiff's costs in performing said alleged contract allowance must be made for every item of cost and expense attending a full compliance with any performance of said alleged

contract, and in estimating any profits which plaintiff claims it would have made in performing said contract you must, of course, exclude all such as are merely speculative and conjectural (Tr. p. 284).

(k) To the ruling of the court in refusing to instruct as a matter of law, as follows:

If you find that a contract has been established with all its essential terms, then when plaintiff ceased to perform the contract, its expense ceased; its plant became free to be used in other ventures and was no longer employed in this, and if it is impossible to ascertain from the evidence what plaintiff saved on the general cost of completing the alleged contract by not being required to perform it, then the evidence is insufficient and too speculative for you to base any just and legal verdict thereon, as to the possible profits plaintiff would have earned or damages it would have sustained (Tr. pp. 284-285).

(l) To the ruling of the court in refusing to instruct as a matter of law, as follows:

If you should find by a preponderance of the evidence that there was a contract between the plaintiff and the defendant it was nevertheless the duty of the plaintiff not to allow its plant to remain idle, but to use every reasonable effort to procure other work and if it did not procure other work to take the place of the work mentioned in said contract, during the time it would be employed in the performance of this contract you should

deduct the amount of profits made by the plaintiff on such other work from any sum you may find it is entitled to under the facts of this case (Tr. p. 285).

(m) To the ruling of the court in refusing to instruct as a matter of law, as follows:

The burden of proof in this case is upon the plaintiff. It does not devolve upon the defendant to show that the plaintiff was not damaged by the alleged breach of contract or if so damaged the amount of those damages, but it devolves upon the plaintiff in order to prevail to establish by a preponderance of the evidence that the alleged breach of contract in fact damaged plaintiff and the amount of such damages (Tr. pp. 285-286).

(n) To the ruling of the court in refusing to instruct as a matter of law, as follows:

If the evidence leaves you in doubt as to whether or not plaintiff was damaged by the breach of contract, or as to the amount of the damages, your verdict must be for the defendant (Tr. p. 286).

(o) To the ruling of the court in refusing to instruct as a matter of law, as follows:

In no instance are you to conjecture or surmise that plaintiff would have profited by the performance of the contract. If no facts are disclosed to you by a preponderance of the evidence which establish that the plaintiff would have profited by the performance of the contract and

the amount of such profits, your verdict must be for the defendant (Tr. p. 286).

(p) To the ruling of the court in refusing to instruct as a matter of law, as follows:

The direct evidence of one witness who is entitled to full credit is sufficient for proving any fact in this case. The evidence upon which your verdict should be based must be satisfactory evidence and that evidence only is satisfactory which produces moral certainty in an unprejudiced mind. You are not to guess at whether or not there was a contract, if any, nor guess at the amount of damages plaintiff sustained, if any, nor should you enter into the realm of speculation for the burden of proving such facts is upon the plaintiff. If you are unable to find from the evidence that there was a contract, or if you find there was a contract, but you are unable to find from the evidence the amount of damages plaintiff sustained, if any, your verdict must be for the defendant. If the evidence upon any of these questions is equally balanced your verdict must also be for the defendant.

If, after a careful consideration of all the evidence you are not able to conclude from the facts which are established that there was a contract, or if you conclude that there was a contract, but that the damages claimed are too speculative or remote, your verdict should be for the defendant, because in none of these instances has the plaintiff established by a preponderance of evidence the facts

which are essential to a verdict in its favor (Tr. p. 287).

(q) To the ruling of the court in refusing to instruct as a matter of law, as follows:

The law in this case, and indeed in every case, is that a party coming into a court of justice must satisfy the jury by what is called a preponderance of evidence as to the justice of his claim; what we mean by a preponderance of evidence is this: We cannot get a pair of scales, and by some arbitrary method put on one side the testimony of plaintiff and on the other side the testimony of defendant and say which outweighs the other, or whether it is evenly balanced, but you are to try to do that mentally as far as possible.

The law says that unless the plaintiff satisfies you throughout the entire case of the correctness of his story to such an extent that it outweighs the proof of the defendant's, he cannot recover. In other words, if the testimony is evenly balanced it shows that there is some doubt in your mind; that it is not sufficient; that is, if the testimony of the plaintiff weighs just the same as that of the defendant you must find for the defendant; that is the law. The plaintiff can only recover where his testimony outweighs that of the defendant (Tr. p. 288).

(r) To the instruction of the court given as follows:

This is an action brought by the plaintiff to recover from the defendant the damages alleged to have been suffered by it through the breach by defendant of a contract for the fabrication of structural steel. With the nature and terms of that contract you have been familiar and I need not recite them. There is, under the evidence, substantially but one question left for your determination in reaching a verdict and that is as to the amount of damages, if any, plaintiff has suffered through the breach of the contract sued on (Tr. pp. 288-289).

(s) To the instruction of the court given as follows:

Counsel for the defendant in his argument concedes that the plaintiff is entitled to some damages, but the amount is in controversy. While the making of the contract and its breach by defendant are both denied in the answer, the evidence shows without any conflict whatsoever that the contract was duly executed between the parties as alleged. It is true that it does not appear that the specifications or detail drawings for all the steel to be furnished under it had been completed by the architect, but it does appear without controversy that those specifications were so far completed as that both parties treated the contract as ready for execution to the extent that the specifications and drawings had been furnished and that plaintiff, at the direction and request of defendant,

had entered upon its execution so that for all purposes affecting the rights of the parties herein involved the contract is to be regarded as having been duly executed. As to the alleged breach of the contract by the defendant, the action of the defendant, as disclosed by the correspondence between the parties and which is wholly uncontroverted directing the stopping of all work under the contract and stating that the contemplated structure had been abandoned, justified plaintiff in treating the contract as at an end, and constituted in law a breach of the contract by defendant. You would not be justified, therefore, under the evidence in finding against either the execution of the contract by the parties or its breach by the defendant as counted upon (Tr. pp. 289-290).

(t) To the instruction of the court given as follows:

The rule or measure of damages which may be recovered for the breach of a contract such as this, is the difference between the consideration stipulated to be paid under the contract for its performance and the cost of such performance. That is to say under the contract in suit, the damages plaintiff will be entitled to at your hands, is the difference between the agreed price per ton for the quantity of structural steel which you may find from the evidence would have been required to complete the contemplated buildings in its entirety as provided in the contract, less what you

may find it would have cost the plaintiff to have completed the fabrication and delivery of such entire quantity of steel; and, in other words, the plaintiff is entitled to the agreed price per ton of the entire quantity of material covered by the contract to be furnished by it, less what it would have cost to deliver it free on board the cars in San Francisco in a fabricated state, with interest and so forth. That interest, I would suggest to you, will be at the legal rate of seven per cent under the law of this state (Tr. pp. 290-291).

(u) To the instruction of the court given as follows:

The question of the amount of damages plaintiff has suffered being in controversy, the burden is upon the plaintiff to establish the amount of such damages by satisfactory evidence; that is, by evidence which produces moral certainty in your mind as unprejudiced persons, and when there is any conflict in the evidence it must preponderate in favor of the plaintiff, that is the evidence should, in your judgment, be to some extent stronger in favor of plaintiff than that which is against it. Preponderance of evidence does not mean the greater number of witnesses, for you are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, as against a less number, or other evidence satisfying your minds. The direct evidence of one witness who was entitled to

full faith and credit is sufficient to prove any fact in a case such as this (Tr. p. 291).

(v) To the instruction of the court as follows:

The evidence on behalf of plaintiff should be such as to enable the jury to determine with reasonable certainty first, that what the probable expense or cost would have been to the plaintiff to have performed the contract in its entirety, this to be determined from the different elements of cost involved in the work as disclosed in the testimony; and secondly, the probable gross quantity of steel, in tons, it would have required to complete the building; thereupon by taking the total cost to plaintiff of fabricating and delivering the material and deducting it from the gross sum produced by multiplying the number of tons of steel you find it would have taken to complete the building by the price per ton fixed in the contract, that is, \$77.00, the difference or result will be the profit which plaintiff would have made on the contract and which would represent the damages which, under the law, it would be entitled to recover (Tr. pp. 291-292).

(w) To the instruction of the court as follows:

In figuring the cost to plaintiff of fabricating the steel in question the fixed and regular monthly salaries paid by plaintiff to its permanent officers and heads of departments, without regard to this particular work, should not be taken into account unless you find that such item of general expense

in plaintiff's business would have been increased by reason of plaintiff having to carry out the entire contract, but the jury should include in the items of cost such amount as they find would be a proper allowance for wear and tear on the machinery in plaintiff's plant had the entire work contemplated by the contract been done at such plant (Tr. p. 292).

(x) To the instruction of the court as follows:

The evidence should be such as to enable you to determine the different elements which I have referred to as entering into the question of damages with reasonable certainty; mathematical certainty is not required, but such degree of certainty as will enable the jury to reach approximately just results.

You will understand as stated, that reasonable certainty in the respect mentioned is all that is required. Plaintiff is not called upon to prove his case to a demonstration. The evidence is all before you and it is for your consideration alone. It is the duty of the court to state the law and by that the jury are bound, but the facts are to be found by the jury as to all questions about which there is any conflict or controversy; and with that function it is not the province of the court to interfere.

You must be certain, however, that your verdict is based upon the evidence, and is not the

result of arbitrary desire on the one hand or of surmise or speculation on the other (Tr. p. 293).

Question 3 above is raised on exceptions:

(a) To the ruling of the court admitting in evidence plaintiff's Exhibit "K" and plaintiff's Exhibit No. 3 (Tr. p. 99).

(b) To the ruling of the court denying the motion for non-suit made by defendant (plaintiff in error) (Tr. pp. 231-232).

Question 4 above is raised on exceptions:

(a) To the ruling of the court denying the motion for non-suit made by counsel for defendant (plaintiff in error) (Tr. pp. 231-232).

II.

Assignment of Errors.

Many errors are assigned in connection with the four main questions presented above, and arise principally upon the admissibility of evidence and upon the giving or the refusing of instructions. All of these latter questions, however, are subsidiary to the four questions enunciated and at most lend color to the propositions therein involved. Independent of their connection with the points made in the admissibility of the evidence, or the instructions the four main questions can be discussed on the record. The other errors will be discussed only in connection with or incidental to

the main questions. A consideration of such errors may give a clearer understanding to the contentions of plaintiff in error.

They are therefore all included in the following assignment of errors upon which the plaintiff in error will rely herein, and which it intends to urge in the prosecution of this writ of error.

ASSIGNMENT No. 1.

The court erred in refusing to give the following instruction requested by the defendant:

“I instruct you that inasmuch as it appears from the evidence that the drawings were a material part of the contract and were never completed, that the contract is void and therefore your verdict must be for the defendant.”

the same being contained in the transcript of record on pages 280 to 281 and said refusal constituting Exception No. 11.

ASSIGNMENT No. 2.

The court erred in refusing to give the following instruction requested by the defendant:

“In its third amended complaint on file plaintiff alleges that on the 19th day of January, 1907, a contract was made with the defendant whereby plaintiff agreed to deliver to defendant F. O. B. cars San Francisco, California, at \$77 per ton the quantity of structural steel and iron required by plans and specifications for the Columbia Theatre Building recited in said alleged contract, which quantity plaintiff estimates at approximately 1500 tons

and plaintiff says that by the terms of the contract plaintiff agreed to deliver all such material to the defendant before September first, 1907."

"I instruct you that unless plaintiff has established to your satisfaction by a preponderance of evidence, the existence of a contract containing all those substantial terms, to wit: the plans and specifications, the character of the work to be done, the price, the quantity to be delivered and the time of delivery, and in addition to that, established by the same preponderance of evidence that plaintiff's cost in carrying out the contract was less than the contract price, your verdict must be for the defendant."

the same being contained in the transcript of record on pages 256-257 and said refusal constituting Exception No. 12.

ASSIGNMENT No. 3.

The court erred in refusing to give the following instruction requested by the defendant:

"It is the duty of the plaintiff to establish by a preponderance of the evidence the complete cost to plaintiff of the performance of this contract. Unless it has done so there is no evidence upon which you may base any verdict as to the amount of damages sustained by plaintiff."

the same being contained in the transcript of record on page 257 and said refusal constituting Exception No. 13.

ASSIGNMENT No. 4.

The court erred in refusing to give the following instruction requested by the defendant:

“You are not to guess at the amount of such costs, nor to enter the realm of speculation, for the burden of proving such costs is upon plaintiff, and if you are unable to find from the evidence the cost of performing the alleged contract and every item of plaintiff’s expenses in such performance, or if you are unable to conclude from the facts which are established to your satisfaction by a preponderance of the evidence what would have been the cost to plaintiff in the performance of said alleged contract, then your verdict should be for the defendant because the plaintiff in that event has not established by a preponderance of the evidence the facts which are essential to a verdict in its favor.”

the same being contained in the transcript of record on page 257 and said refusal constituting Exception No. 14.

ASSIGNMENT No. 5.

The court erred in refusing to give the following instruction requested by the defendant:

“In a case of this kind there are two distinct items as the ground of damages. *First:* What has already been expended towards performance, less the value of the materials on hand, purchased for this particular work. *Second:* The profits that plaintiff would have realized by the performance of the whole contract.

The second item, profits, cannot always be recovered. They may be too remote and speculative in their character and therefore incapable of that clear and direct proof which the law requires.”

the same being contained in the transcript of record on pages 257-258 and said refusal constituting Exception No. 15.

ASSIGNMENT No. 6.

The court erred in refusing to give the following instruction requested by the defendant:

“If it is possible for you to satisfy yourself by a preponderance of the evidence of the cost to plaintiff of the performance of this contract then before you may render a verdict as to the amount of damages it sustained, if any, you must determine from a preponderance of evidence what deduction should be made from the contract price for the time saved by plaintiff in the performance of the contract, its release from care, trouble, risk and responsibility attending a full execution of the contract; unless you are able to determine from the evidence what amount plaintiff saved in these circumstances, your verdict must be for the defendant.”

the same being contained in the transcript of record on page 258 and said refusal constituting Exception No. 16.

ASSIGNMENT No. 7.

The court erred in refusing to give the following instruction requested by the defendant:

“If there is omitted from the evidence, elements of expense which the plaintiff would have incurred had the contract been performed, or elements showing the amount plaintiff saved by not devoting all the time that would have been required in the performance of the contract and release from the risk of performance, then your verdict should be for the defendant.”

the same being contained in the transcript of record on page 258 and said refusal constituting Exception No. 17.

ASSIGNMENT No. 8.

The court erred in refusing to give the following instruction requested by the defendant:

“In determining plaintiff’s cost in performing said alleged contract allowance must be made for every item of cost and expense attending a full compliance with, any performance of, said alleged contract, and in estimating any profits which plaintiff claims it would have made in performing said contract you must, of course, exclude all such as are merely speculative and conjectural.”

the same being contained in the transcript of record on pages 258-259, and said refusal constituting Exception No. 18.

ASSIGNMENT No. 9.

The court erred in refusing to give the following instruction requested by the defendant:

“If you find that a contract has been established with all its essential terms, then when plaintiff ceased to perform the contract its expense ceased; its plant became free to be used in other ventures and was no longer employed in this and if it is impossible to ascertain from the evidence what plaintiff saved on the general cost of completing the alleged contract by not being required to perform it, then the evidence is insufficient and too speculative for you to base any just and legal verdict thereon,

as to the possible profits plaintiff would have earned or damages it would have sustained.”

the same being contained in the transcript of record at page 259 and said refusal constituting Exception No. 19.

ASSIGNMENT No. 10.

The court erred in refusing to give the following instruction requested by the defendant:

“If you should find by a preponderance of the evidence that there was a contract between the plaintiff and the defendant it was nevertheless the duty of the plaintiff not to allow its plant to remain idle, but to use every reasonable effort to procure other work and if it did not procure other work to take the place of the work mentioned in said contract during the time it would be employed in the performance of this contract, you should deduct the amount of profits made by the plaintiff on such other work from any sum you may find it is entitled to under the facts of this case.”

the same being contained in the transcript of record on page 259 and said refusal constituting Exception No. 20.

ASSIGNMENT No. 11.

The court erred in refusing to give the following instruction requested by the defendant:

“The burden of proof in this case is upon the plaintiff. It does not devolve upon the defendant to show that the plaintiff was not damaged by the alleged breach of contract, or

if so damaged the amount of those damages. But it devolves upon the plaintiff in order to prevail to establish by a preponderance of the evidence that the alleged breach of contract in fact damaged plaintiff and the amount of such damages."

the same being contained in the transcript of record on page 260 and said refusal constituting Exception No. 21.

ASSIGNMENT No. 12.

The court erred in refusing to give the following instruction requested by the defendant:

"If the evidence leaves you in doubt as to whether or not plaintiff was damaged by the breach of contract, or as to the amount of the damages, your verdict must be for the defendant."

the same being contained in the transcript of record on page 260 and said refusal constituting Exception No. 22.

ASSIGNMENT No. 13.

The court erred in refusing to give the following instruction requested by the defendant:

"In no instance are you to conjecture or surmise that plaintiff would have profited by the performance of the contract. If no facts are disclosed to you by a preponderance of the evidence which establish that the plaintiff would have profited by the performance of the contract and the amount of such profits your verdict must be for the defendant."

the same being contained in the transcript of record on page 260 and said refusal constituting Exception No. 23.

ASSIGNMENT No. 14.

The court erred in refusing to give the following instruction requested by the defendant:

“The direct evidence of one witness who is entitled to full credit is sufficient for proving any fact in this case. The evidence upon which your verdict should be based must be satisfactory evidence and that evidence only is satisfactory which produces moral certainty in an unprejudiced mind. You are not to guess at whether or not there was a contract, if any, nor guess at the amount of damages plaintiff sustained, if any, nor should you enter into the realm of speculation for the burden of proving such facts is upon the plaintiff. If you are unable to find from the evidence that there was a contract, or if you find there was a contract, but you are unable to find from the evidence the amount of damages plaintiff sustained, if any, your verdict must be for the defendant. If the evidence upon any of these questions is equally balanced your verdict must also be for the defendant.

If, after a careful consideration of all the evidence you are not able to conclude from the facts which are established that there was a contract, or if you conclude that there was a contract but that the damages claimed are to speculative or remote your verdict should be for the defendant because in none of these instances has the plaintiff established by a preponderance of evidence the facts which are essential to a verdict in its favor.”

the same being contained in the transcript of record on pages 260-261 and said refusal constituting Exception No. 24.

ASSIGNMENT No. 15.

The court erred in refusing to give the following instruction requested by the defendant:

“The law in this case, and indeed in every case, is that a party coming into a court of justice must satisfy the jury by what is called a preponderance of evidence as to the justice of his claim; what we mean by a preponderance of evidence is this: We cannot get a pair of scales and by some arbitrary method put on one side the testimony of plaintiff and on the other side the testimony of defendant and say which outweighs the other, or whether it is evenly balanced, but you are to try to do that mentally as far as possible.

The law says that unless the plaintiff satisfies you throughout the entire case of the correctness of his story to such an extent that it outweighs the proof of the defendant's, he cannot recover. In other words, if the testimony is evenly balanced it shows that there is some doubt in your mind; that it is not sufficient; that is, if the testimony of the plaintiff weighs just the same as that of the defendant, you must find for the defendant, that is the law. The plaintiff can only recover where his testimony outweighs that of the defendant.”

the same being contained in the transcript of record on pages 261, 262 and said refusal constituting Exception No. 25.

ASSIGNMENT No. 16.

The court erred in giving the following instruction:

“The COURT. Ordinarily I would not submit the case to you at this hour, but we are rather short of jurors on the panel and I may need your services in another case in the morning. It strikes me that this case is a very simple one, not only in its facts, but in regard to the law, and I have an idea that you will be able to reach a verdict without difficulty and without remaining out over night, or any considerable period into the night. My hesitation about submitting a case to a jury late in the day is that possibly they might get tied up and have to stay out all night. I know that is very unpleasant, but I do not apprehend any such results will follow in this case, so I will submit the case to you now. Give me your attention.

This is an action brought by the plaintiff to recover from the defendant the damages alleged to have been suffered by it through the breach by defendant of a contract for the fabrication and delivery of structural steel. With the nature and terms of that contract you have been made familiar and I need not recite them. There is, under the evidence, substantially but one question left for your determination in reaching a verdict, and that is as to the amount of damages, if any, plaintiff has suffered through the breach of the contract sued on.

Counsel for the defendant in his argument concedes that the plaintiff is entitled to some damages, but the amount is in controversy. While the making of the contract and its breach by the defendant are both denied in the answer the evidence shows without any conflict whatsoever that the contract was duly

executed between the parties as alleged. It is true that it does not appear that the specifications or detail drawings for all the steel to be furnished under it have been completed by the architect, but it does appear without controversy that those specifications were so far completed as that both parties treated the contract as ready for execution to the extent the specifications and drawings had been furnished, and that plaintiff at the direction and request of defendant had entered upon its execution so that for all purposes affecting the rights of the parties here involved the contract is to be regarded as having been duly executed. As to the alleged breach of the contract by the defendant the action of the defendant as disclosed by the correspondence between the parties and which is wholly uncontroverted, directing the stopping of all work under the contract and stating that the contemplated structure had been abandoned, justified plaintiff in treating the contract as at an end, and constituting in law a breach of the contract by defendant. You would not be justified, therefore, under the evidence in finding against either the execution of the contract by the parties or its breach by the defendant as counted upon.

This leaves, as I have said, but one substantive question for your consideration, and that is the question of damages.

The rule or measure of damages which may be recovered for the breach of a contract such as this is the difference between the consideration stipulated to be paid under the contract for its performance and the cost of such performance. That is to say, under the contract in suit, the damages plaintiff will be entitled to at your hands is the difference between the agreed price per ton for the quantity of structural steel which you may find from the

evidence would have been required to complete the contemplated building in its entirety as provided in the contract, less what you may find it would have cost the plaintiff to have completed the fabrication and delivery of such entire quantity of steel; in other words, the plaintiff is entitled to the agreed price per ton of the entire quantity of material covered by the contract to be furnished by it, less what it would have cost to deliver it free on board the cars in San Francisco in a fabricated state, with interest and so forth. That interest I would suggest to you will be at the legal rate of seven per cent under the law of this state.

The question of the amount of damages plaintiff has suffered being in controversy, the burden is upon the plaintiff to establish the amount of such damages by satisfactory evidence, that is, by evidence which produces moral certainty in your mind as unprejudiced persons, and when there is any conflict in the evidence it must preponderate in favor of the plaintiff, that is, the evidence should, in your judgment, be to some extent stronger in favor of plaintiff than that which is against it. Preponderance of evidence does not mean the greater number of witnesses, for you are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds as against a less number or other evidence satisfying your mind. The direct evidence of one witness who is entitled to full faith and credit is sufficient to prove any fact in a case such as this.

The evidence on behalf of plaintiff should be such as to enable the jury to determine with reasonable certainty, first, what the probable expense or cost would have been to the plaintiff to have performed the contract in its entirety, this to be determined from the different

elements of cost involved in the work as disclosed in the testimony; and, secondly, the probable gross quantity of steel in tons it would have required to complete the building. Thereupon, by taking the total cost to plaintiff of fabricating and delivering the material and deducting it from the gross sum produced by multiplying the number of tons of steel you find it would have taken to complete the building by the price per ton fixed in the contract, that is, \$77, the difference or result will be the profit which plaintiff would have made on the contract and which would represent the damages, which, under the law, it would be entitled to recover.

In figuring the cost to plaintiff of fabricating the steel in question, the fixed and regular monthly salaries paid by plaintiff to its permanent officers and heads of departments without regard to this particular work, should not be taken into account unless you find that such items of general expense in plaintiff's business would have been increased by reason of plaintiff having to carry out the entire contract; but the jury should include in the item of cost such amount as they find would be a proper allowance for wear and tear on the machinery in plaintiff's plant had the entire work contemplated by the contract been done at such plant.

The evidence should be such as to enable you to determine the different elements which I have referred to as entering into the question of damages with reasonable certainty; mathematical certainty is not required, but such degree of certainty as will enable the jury to reach approximately just results.

You will understand, as stated, that reasonable certainty in the respect mentioned, is all that is required; plaintiff is not called upon to prove his case to a demonstration; the evidence is all before you and it is for your con-

sideration alone. It is the duty of the court to state the law and by that the jury are bound, but the facts are to be found by the jury as to all questions about which there is an conflict or controversy; and with that function it is not the province of the court to interfere.

You must be certain, however, that your verdict is based upon the evidence and is not the result of arbitrary desire on the one hand or of surmise or speculation on the other.

The clerk has prepared forms of verdict for you, gentlemen of the jury, which you will make out in this case as indicated to you by my instructions. When you have reached a conclusion you will report to the court. As it has been suggested, the plaintiff will be entitled to some verdict at your hands, so the other form of verdict which the clerk has drawn up will not be required and all that it will be necessary for you gentlemen to do is to fill in the amount of damages which you may find in favor of the plaintiff. You will bear in mind that in the federal court the verdict of the jury must be unanimous, and cannot be by a less number as in the state courts. You may now retire, gentlemen of the jury."

the same being contained in the transcript of record on pages 262-267, and the giving thereof constituting Exception No. 26.

ASSIGNMENT No. 17.

The court erred in overruling the objection of counsel for the defendant (plaintiff in error) to the introduction in evidence at the trial of said cause of a certain proposition which purports to be a proposition by the Modern Steel Structural Company, dated Waukesha, Wisconsin, January 4,

1907, to the American-Pacific Construction Company, whereby the Modern Steel Structural Company agreed to furnish the structural steel and iron and reinforcing steel (except the grillage beams, bolts, separators and column bases mentioned on page 3 of specifications referred to in said proposal) for the Richelieu Syndicate Theatre and Office Building known as the Columbia Theatre, located southeast corner Van Ness Avenue and Geary Street, San Francisco, California, being plaintiff's Exhibit "K", and which was and is in exactly the following words and figures, to wit:

"Modern Steel Structural Co.

Waukesha, Wis., Jan. 4, 1907.

American-Pacific Construction Co.,

San Francisco, Cali.

We propose to furnish you in good order the following described structural material constructed in a workmanlike manner described as follows and in accordance with drawings furnished by Joseph D. Smedberg and specifications also furnished by J. D. Smedberg, identified with marks:

'Copy No. 1', initialed, 'S. B. H. 12/30/06', excepting as noted under 'REMARKS' on sheet No. 2 attached.

Namely the structural steel and iron and reinforced steel (except the grillage beams, bolts, separators and column bases mentioned on page 3, of specifications referred to above) for the Richelieu Realty Syndicate Theatre and Office Building, known as the Columbia Theatre; location, southeast corner of Van Ness and Geary Street, San Francisco, Cali.

Delivery as follows: *That portion indicated by Mr. Smedberg, shown within red lines on blue prints 3-S, 4-S, 7-S, dated by us on back*

of print as received Dec. 31, 1906, and 8-S, dated by us on back of print as received Jan. 3, 1907, required to begin erection of steel work on stores to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg.

Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg.

REMARKS. Our proposition is based on the substitution in part (as referring to '*Kind, Character and Finish of Materials*' beginning on page 9 and '*Inspection*' beginning page 11 of the above specifications) of Manufacturers' Standard Specifications as found in Carnegie's Hand Book.

Mill Test Reports, within said specifications are proposed as being satisfactory in the above respects to Mr. Smedberg, and upon his request stating upon which portions of the work he will require such reports, we will comply therewith by furnishing same.

We also agree that the tonnage is to be determined and paid for by certificates from the Western Weighing Association at the point of shipment. It is understood that the AMERICAN-PACIFIC CONSTRUCTION COMPANY, at their own expense, will weigh same at the public scales in San Francisco, and should they prove that the weights so certified by the Western Weighing Association at point of shipment are not correct, we hereby agree to reimburse the AMERICAN CONSTRUCTION COMPANY, the amount overpaid us.

Price to be Seventy-seven dollars (\$77.00) per ton: Freight allowed to San Francisco, Cali. Correct figured weights of steel to govern amount of sale and all steel work to be accepted at our works by Mr. Smedberg, or his authorized agent.

Terms of payment as follows: 30 days net cash from date of invoices.

Payable in New York, Chicago or Milwaukee exchange, free of expense to us for the collection charges.

We are responsible for shop errors in work not erected by ourselves and for alterations, whether erected by ourselves or not, only when notified of same in writing before correction is made and given an opportunity and reasonable time to suggest remedy or to ourselves make alterations.

When delays are caused to our men by material or labor not furnished by us, you agree to pay their time, at our regular rates and their expenses, while so delayed.

This contract is contingent upon our ability to procure material from the mills, delays of carriers and upon strikes, accidents or other delays unavoidable or beyond our reasonable control.

It is expressly agreed that there are no promises, agreements of understandings outside of this contract and that no agent or salesman has any authority to obligate the MODERN STEEL STRUCTURAL COMPANY by any terms, stipulations or conditions not herein expressed.

The title and right of possession to all material we furnish remains with the MODERN STEEL COMPANY until the same has been fully paid for in cash.

This proposition is for immediate acceptance, but although accepted does not constitute a contract until approved by an executive officer of the Modern Steel Structural Company, and is subject to change or withdrawal until so approved.

In case any difference of opinion shall arise between the parties to this contract in relation to the contract, the work to be or that has been performed under it, such difference shall be

settled by arbitration by two competent persons, one employed by each party to the contract, and these two shall have the power to name an uninterested umpire (testimony of F. W. Harding), whose decision shall be binding on all parties to the contract.

Ship via:

MODERN STEEL STRUCTURAL Co.,
Accepted Jany. 17, 1907, by S. B. H.

Approved by S. B. Harding, Pres.

AMERICAN-PACIFIC CONSTRUCTION Co.,
Thomas Vigus,
General Manager."

and admitting the same in evidence as shown in the transcript of record on pages 99 and 190-196, and said ruling constituting Exception No. 27.

ASSIGNMENT No. 18.

The court erred in overruling the objection of counsel for the defendant (plaintiff in error) to the following question asked by counsel for plaintiff of the witness, Samuel B. Harding:

" 'Does it indicate the acceptance of the contract?' To which question witness replied, 'It indicates that I, on receipt of that letter and enclosure, gave the job a number, and contract as it were, through which it would be known in our plant by number. That is the custom whenever we receive an accepted contract, to at once give it a number.' "

and admitting the same in evidence as shown in the transcript of record on page 276, and said ruling constituting Exception No. 28.

ASSIGNMENT No. 19.

The court erred in overruling the objection of counsel for the defendant (plaintiff in error) to the introduction in evidence at the trial of said cause of certain specifications made by Frank T. Shay, Architect, San Francisco, and Joseph D. Smedberg, Consulting Engineer, San Francisco, which purported to be specifications for the structural steel and iron of an eight-story office building and theatre to be erected on the southeast corner of Van Ness Avenue and Geary Street, for the Richelieu Syndicate, San Francisco, Cal., being plaintiff's Exhibit "M", and admitting the same in evidence as shown in the transcript of record on page 276, and said ruling constituting Exception No. 29.

ASSIGNMENT No. 20.

The court erred in overruling the objection of counsel for the defendant (plaintiff in error) to the introduction in evidence at the trial of said cause of certain detail drawings consisting of 31 sheets on tracing cloth, made by the Modern Steel Structural Company, which purported to be detail drawings for a part of the structural steel work for said Columbia Theatre Building, being plaintiff's Exhibits "A", "B", etc., and annexed to defendant's bill of exceptions, and marked Exhibit "A" and admitting the same in evidence, as shown

in the transcript of record on pages 276-277, and said ruling constituting Exception No. 30.

ASSIGNMENT No. 21.

The court erred in overruling the objection of counsel for said defendant (plaintiff in error) to the following question asked by counsel for plaintiff of the witness, Samuel B. Harding:

“ ‘Now, Mr. Harding, I will ask you if at all times during the months of March, April, May and June, 1907, the plaintiff stood ready and willing to carry out the contract with the defendant?’ to which question the witness replied, ‘It did.’ ”

and admitting the same in evidence as shown in the transcript of record on page 277, and said ruling constituting Exception No. 31.

ASSIGNMENT No. 22.

The court erred in refusing to grant the motion of counsel for said defendant (plaintiff in error) to strike out the following portion of the answer of the witness Samuel B. Harding:

“ ‘And my reasons for that statement would be this: The American-Pacific Construction Company, through Mr. Vigus, talked of 1400 tons; the architect and his engineer talked of 14 or 1500 tons, as I remember it; now the architect’s plans—I am speaking now of the original plans from which we made our detail drawings—were incomplete at the time we began work and Mr. Smedberg came up for the purpose of completing these drawings, and insofar as we went in examining the original

drawings prepared by the architect, we found a number of places where they were not up to the ordinances, and that was the occasion of our writing our letter of March 26, marked Exhibit "O", calling attention to the discrepancies, and I therefore, from such investigations and discrepancies found, think that the building would run up to the 1500 ton mark, if not more, as these increases spoken of are 20 per cent or 25 per cent. Of course this would not apply to all the structure.' The question propounded to the witness was: 'But 1500 tons at least according to these specifications?' To this question the witness answered 'Yes,' and proceeded as stated before."

and admitting the same in evidence as shown in the transcript of record on pages 277-278, and said refusal constituting Exception No. 32.

ASSIGNMENT No. 23.

The court erred in overruling the objection of counsel for said defendant (plaintiff in error) to the following question asked by counsel for plaintiff of the witness, Frederick Hoffman:

" 'From your examination of the drawings and specifications of the buildings, in your judgment, what quantity of structural steel was required to carry out the plans and specifications for the Columbia Theatre Building in question?' to which question the witness replied: 'In my judgment it would take in the neighborhood of 1500 tons.' "

and admitting the same in evidence as shown in the transcript of record on page 278, and said ruling constituting Exception No. 33.

ASSIGNMENT No. 24.

The court erred in sustaining the objection of counsel for plaintiff to the following question asked by counsel for defendant (plaintiff in error) of the witness, Thomas Vigus:

“ ‘With whom did you have that conversation’? It was admitted that the conversation sought to be elicited was had with S. B. Harding, the president of the plaintiff company,”

and excluding the same from evidence as shown in the transcript of record on pages 278-279, and said exclusion constituting Exception No. 34.

ASSIGNMENT No. 25.

The court erred in denying the motion of counsel for defendant (plaintiff in error) for a judgment of non-suit and dismissal. Said motion being made on the following grounds:

“1. That there is a failure of proof in the following particulars:

a. It is not shown by the evidence that there has been a completed contract; on the contrary, the evidence shown that the contract is incomplete and imperfect in this:

That the proposal which is set forth in the evidence here and dated the 4th day of January, 1907, states that the defendant was to furnish certain structural steel in accordance with drawings and specifications to be furnished by Joseph Smedberg, which were identified with certain marks. It affirmatively appears from the evidence that those drawings have never been made or furnished.

2. There is a variance in this: The contract alleged required the plaintiff to deliver to de-

fendant at San Francisco the fabricated steel on or before the 1st day of September, 1907, while the contract placed in evidence by plaintiff required delivery to be made within sixty or ninety days after completion of the detailed drawings.

3. There is a variance in this: The contract alleged states that there was an agreed tonnage of 1500 tons of steel to be furnished, while the contract placed in evidence shows there was agreed tonnage.

4. The action is premature inasmuch as the contract offered in evidence provides: 'In case any difference of opinion shall arise between the parties to this contract in relation to the contract, the work to be, or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract, and these two shall have the power to name an uninterested umpire whose decision shall be binding on all parties to the contract.' From the evidence it appears that there was no arbitration, and therefore the action is premature.

5. There is no evidence of damages. The attempt to show loss of profits or damages failed. There is absolutely no evidence of the costs, hence there is no way of determining any damages, except by guesswork."

as shown in the transcript of record on pages 279-280 and said denial constituting Eception No. 35.

To the discussion of the questions involved in the case as reflected by the propositions advanced in the rulings and instructions which constitute the foregoing assignment of errors we shall now proceed.

III.

Argument.

I.

THE PROPOSAL OF THE DEFENDANT IN ERROR AND ITS ACCEPTANCE BY THE PLAINTIFF IN ERROR DID NOT CONSTITUTE A VALID OR ANY CONTRACT (Exhibits "K" and No. 3 p. 99) BECAUSE:

(a) *It was incomplete as it proposed to furnish all the structural steel required for a building to be constructed in accordance with drawings to be furnished by Joseph D. Smedberg, which drawings were never made and therefore there was no means of knowing or determining the quantity of steel to be furnished.*

(b) *Although the purpose was to furnish all the structural steel shown by drawings and specifications to be furnished by Joseph D. Smedberg, neither drawings nor specifications were ever attached to, nor made part of said proposal; and neither the drawings nor specifications were ever completed. Therefore, it was impossible for either party to know the quantity of steel to be fabricated; the manner in which it was to be fabricated; or the size, form, weight or appearance of the various steel members entering into said building or the cost of fabricating the same.*

(c) *The said alleged contract is uncertain and indefinite in the amount of steel to be fabricated or size (long, short, broad or narrow), weight (light or heavy) form, appearance or style into which the*

various steel members of the proposed building were to be fabricated. Therefore, the defendant in error never could fabricate the steel required for a building, the drawings and designs for which were never furnished; until they were finished even the architect of the proposed building could not describe any of its members, although in his mind he had formed a concept of its exterior design.

Even a casual reading of the exhibit shows it to be a mere indefinite proposal. It is so designated. It was submitted by the defendant in error and must be construed against it and in favor of the plaintiff in error.

There can be no contract, so-called, enforceable at law unless its terms are certain, and the minds of the parties to the contract have met and agreed on its terms. This is horn-book law. It is so elementary and the authorities bearing thereon so numerous, and relate to cases of such varying circumstances, that only a few, illustrative of these principles, are cited.

In *Levy v. Mantz*, 16 Cal. App. 666, 670, it is held that the due execution of a contract requires the assent of at least two minds to each and all of the essentials of the agreement; and it is only upon evidence of such assent that the law enforces the terms of the contract.

In *Grafton v. Cummings*, 99 U. S. 106, the court said:

“In an agreement of sale * * * there must be a *sufficient description of the thing sold* and of *the price to be paid for it*. It is, therefore, an essential element of the contract, that it shall contain within itself a description of the thing sold by which it must be known or identified.”

In *Gill Mfg. Co. v. Hurd*, 18 Fed. 673, it is held that in order to constitute a contract the minds of the parties must meet on all its terms. If any part of the contract was not settled or a mode agreed upon to settle it, as to that part there would be no contract.

In *Almini Company v. King*, 92 Ill. App. 276, defendant in error sued to recover damages for the failure of plaintiff in error to comply with the terms of an alleged contract in writing by which it is said to have agreed to do the painting and glazing upon a house in process of construction. The contract referred to plans and specifications as “herein made a part” of it.

In holding the contract unenforceable, the court said:

“They are not, however, attached to the instrument, nor is there anything in the contract to locate or identify them in any way. The contract, therefore, as offered, and upon which defendant in error bases his claim to recover, is incomplete. The original specifications, as prepared, were introduced, but there is no evidence that they were ever seen by the Almini Company, or its agents, either before or at the time the contract was signed, or that they ever were in any way attached to or made a part of or

identified in the contract, and there is no evidence to the contrary. The incomplete contract was not admissible in evidence and the objection thereto should have been sustained."

Also:

Wait Eng. & Arch. Juris., Secs. 214-695;

Worden v. Hammond, 37 Cal. 61;

Willamette etc. Co. v. College Co., 94 Cal. 229;

Donnelly v. Adams, 115 Cal. 129;

Hitchcock v. Galveston Fed. Co., 6534;

Woir v. Brown, 14 Barb. 39, 50;

Merchers v. Schloss, 49 How. Pr. 286;

Adams v. Hill, 16 Me. 215.

No case can be cited in which a contract as incomplete or as uncertain as the alleged contract in the case at bar was ever sustained.

Remembering the principles announced above, we quote from the proposal:

"*Proposal from the Modern Steel Structural Company*", dated "Waukesha, Wis. Jan. 4, 1906". "We propose to furnish you in good order the following described structural material, constructed in a workmanlike manner *described as follows and in accordance with* DRAWINGS FURNISHED BY JOS. D. SMEDBERG *and* SPECIFICATIONS ALSO FURNISHED BY JOS. D. SMEDBERG, IDENTIFIED WITH MARKS: "Copy #1, initialed, 'S. B. H. 12/30.06'," excepting as noted under rearks on sheet #2 attached, namely, the structural steel and iron, etc."

The proposal in providing for the time of delivery, states that certain of the structural material was

“to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg. Balance of steel shipments to be 60 or 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg.”

It must be conceded by the defendant in error—the uncontradicted evidence forces the concession:

1. That said Joseph D. Smedberg was the engineer employed by the Richelieu Realty Syndicate and by its architect, Frank T. Shay, and was not in the employ of the American-Pacific Construction Company (plaintiff in error).

See

Testimony of S. B. Harding, president, defendant in error (Tr. p. 104; Tr. p. 127); Specifications received in evidence on behalf of defendant in error (Tr. p. 106; also p. 107);

Testimony of F. W. Harding, vice president, defendant in error (Tr. p. 223).

2. That the drawings referred to in the said proposal were never completed nor furnished by Joseph D. Smedberg.

(a) Even the drawing for the upper part of the office portion of the building was not completed when the proposal was accepted.

Testimony S. B. Harding (Tr. p. 104).

(b) The theatre constituted more than one-half of the proposed combined office and theatre building.

F. W. Harding, vice president of defendant in error, testified the theatre would occupy from forty to fifty per cent of the entire building (Tr. p. 254; also p. 255).

C. H. Snyder, contracting engineer with Milliken Brothers, witness for plaintiff in error, testified the theatre would constitute more than one-half the ground floor, and up to the sixth story of an eight-story building (Tr. p. 246).

John D. Galloway, structural engineer, testified the theatre would constitute at least seventy-five per cent of the combined office and theatre building (Tr. p. 249).

And yet while the theatre constituted from one-half to seventy-five per cent of the entire combined building, there was absolutely no drawing or architectural design of the theatre ever prepared. Even the general plans for the theatre had not been prepared.

The specifications of building offered in evidence by defendant in error (plaintiff below) contain the following:

“The general plans for the Theatre portion of the building being incomplete still, the intention is to erect the Office Building portion first and especially rush work on the first section columns, first and second story beams and sidewalk beams. Open holes in columns, beams and

girders for *connecting Theatre Catilevers, etc., will be drilled in the field, as arrangement of theatre framing cannot be determined accurately at present*, and this method will not delay any portion of the office building construction, due to lack of information regarding connection" (Tr. p. 108).

F. W. Harding, vice president of defendant in error, testified that the drawings *as far as the theatre was concerned* were never prepared (Tr. p. 255; also p. 201).

S. B. Harding, president of the defendant in error, speaking of the drawings for the building, testified they were only completed in part (Tr. p. 131; also p. 165).

(c) The papers or drawings, so called, in evidence, are mere detailed drawings prepared by the defendant in error for a small part of the office part of the building and mostly cover the thirty-nine and one-fourth tons of steel shipped to plaintiff in error (Tr. bottom p. 201, p. 202).

These papers or drawings are not architectural plans but shop details and there is nothing among them from which one could make an estimate of the total steel for the building (Tr. pp. 247-248).

All the drawings and material sheets in evidence taken together, only cover or represent 256 to 262 tons of steel (Tr. p. 236; also p. 241).

(d) There is no paper or drawing or anything else in the record from which any engineer could determine how many tons of steel would be re-

quired to complete the proposed or projected building.

Testimony William Breite, p. 234, p. 235;

Testimony Peter Zucco, p. 241;

Testimony John D. Galloway, pp. 247, 248.

All the above facts are undisputed. Most of them are taken from the testimony of the chief witnesses for the defendant in error, viz.: S. B. Harding, its president, and F. W. Harding, its vice president. It is not a case where experts disagree because there is no disagreement. The witnesses of the plaintiff in error are not only not contradicted by, but supported by, the testimony of the witnesses for defendant in error, except in one particular viz.: *that there is no way from the evidence by which the number of tons of steel required for the projected building may be ascertained.* The witnesses for defendant in error admit there are no drawings from which this tonnage may be ascertained, but they say that if they know the dimensions generally, they can "cube" a building and thereby estimate the tonnage of steel. This method of "guessing" is the only suggestion of the number of tons of steel required.

But three witnesses testified to the number of tons. S. B. Harding, president of the defendant in error, said about fifteen hundred tons would be required because Mr. Vigus

"talked of 1400 tons; the architect and his engineer talked of 14 or 1500 tons, as I remember it. The architect's plans were incomplete and

in examining the plans, I found many discrepancies and from such investigation, and discrepancies found, *think* that building would run up to 1500 tons, if not more" (Tr. p. 130, p. 131).

Frederick Hoffman, an employee of defendant in error testified:

"To a certain extent I am familiar with the plans and specifications for the Columbia Theatre job at San Francisco, which came into the shop of the plaintiff early in January, 1907. At that time I knew, from the plans and specifications, the length, width and height of the building, and generally in regard to its dimensions. I had nothing to do with the making of the detail drawings.

Q. From your examination of the drawings and specifications of the building, in your judgment, what quantity of structural steel was required to carry out the plans and specifications for the Columbia Theatre Building in question?

A. In my judgment, it would take in the neighborhood of 1500 tons.

The WITNESS (continuing). That would be a fair estimate; I arrived at approximately 1500 tons of structural steel by my past experience, considering buildings of similar construction and size, and considering the plans and specifications and the city ordinances of San Francisco, covering such buildings at that time. I had before me the city ordinances and specifications. I have no interest in this litigation."

On cross-examination he testified:

"I did not take off the quantities from the plans of the Columbia Theatre building. I said it would take 1500 tons of steel because I just

estimated that on past experience with other buildings and passed my judgment on the specifications and what they called for. It was only an estimate."

F. W. Harding, vice-president of the defendant in error, testified (direct examination):

" * * * I can state very approximately that at least 1500 tons of steel would have been required to construct that building. * * * *Although it never became part of my duty to remember quantities, but I was required to place valuations on work. The estimating of quantities would be done by our clerical force*" (Tr. p. 182).

On cross-examination he testified:

"I estimated that 1500 tons of steel would be required for the building, but I could not take the quantities to determine that. I had to take the cubic foot rule, because the general drawings were not completed for the entire building, but we knew the size of the building."

This is the only testimony offered by defendant in error to prove the quantity of steel it was required to furnish. How can it expect to sustain the verdict? There is no testimony of the tonnage. *S. B. Harding* bases his opinion of 1500 tons because some one "talked about" that amount.

Frederick Hoffman, on cross-examination, knew nothing. He simply "estimated"—the better word would be "guessed".

F. W. Harding admitted he knew nothing about taking quantities, but stated "very approximately that at least 1500 tons". It was not a part of his

business to remember quantities but he remembers this amount (Tr. p. 182). *The only people who did the estimating of quantities for the defendant in error—members of its clerical force—*(Tr. p. 182) were not called to testify. Why not? The testimony of witnesses Harding, Frederick Hoffman and H. A. Sell was taken at the plant of defendant in error where all its clerks were and while they were present. Why were they not invited to testify? *Because they would have been compelled to answer that there was no means of determining the number of tons.* They would have testified with witness Breite (Tr. 234-235) that before the number of tons of steel for any particular big building may be determined, there must be a complete design showing each steel member that enters into the building. Without that complete design it is not possible to tell the number. Without that complete design it is impossible to tell the number of tons and that in the case at bar there was nothing to show which way the theatre portion was to be constructed, although there was a portion of the plans that showed a portion of the theatre but without any size or figures or dimensions on it from which you could draw any conclusion whatsoever, and that it would not be possible to cube such a building because the engineer or the man that is cubing the building cannot put himself in touch with the architect's idea or his method of construction. The architect may design some very elaborate architectural features

that require a great deal more steel than other features and until the design is completed it would be impossible for a man to cube up a theatre building, or a theatre, or a church or a large auditorium or building of any such character. And with witness Galloway (Tr. p. 248) that the method of obtaining the weight of steel in a building of this character by obtaining its cube is regarded merely as a general method and is in no sense of the term accurate and that on account of the complications entering into a theatre building and design of a theatre building, that it is impossible to tell the total weight of structural steel in such a building without knowing the design and that the only way to determine the weight of steel for such a building would be to have plans prepared and estimates made, piece by piece.

In their testimony the members of this clerical force would absolutely agree with the testimony given by F. W. Harding, the vice-president of the defendant in error, when he was not thinking of the necessity of establishing that 1500 tons of steel would be required to complete the building and he testified as follows:

“We cannot tell how to fabricate the steel until we have the design from the architect; until we have that design we don’t know what the members are going to consist of absolutely. If we were engineers we could, otherwise we cannot use our own judgment in a matter of that kind. We have to wait for the architect.”

(Tr. p. 225.)

If there is no means of knowing the steel members until the plans are received how may their weight be estimated? Who is to say how long or how short, how heavy or how light, how thick or how thin they may be designed?

A.

The above review of the testimony establishes that the drawings referred to in the original contract were never completed and that there were no drawings in existence for the main part of the combined structure, namely theatre, which was to occupy from one-half to three-quarters of the combined office building and theatre. This makes the contract incomplete and inchoate and unenforceable.

B.

Neither the drawings nor specifications were attached to the alleged contract. Without the specifications and drawings attached the original contract was incomplete.

“Very often many of the important stipulations and conditions of a contract are incorporated into the specifications as general conditions applicable to almost any work and they should be made a part of the contract with certainty. The plans showing the extent and size of the work undertaken, and specifications describing it and the materials to be used, and the direction as to the performance of the contract are a necessary and important part of the contract. They are as binding as are the terms and covenants of the contract.”

Wait, Engineering and Architectural Jurisprudence, Sec. 214.

“The amount of work to be performed, which may be taken as the basis of such an estimate of the cost are the quantities given in the specifications or shown on the plans and described in the contract, and it is submitted that the advertisement and proposal might be utilized, if the contract, specifications and plans did not furnish an estimate of its magnitude but not it seems estimates by the company’s engineers made after the contract was entered into.”

Wait Engineering and Architectural Jurisprudence, 634, Sec. 695.

In *Worden v. Hammond*, 37 Cal. 61 at page 64, the court said:

“The specifications are an essential part of the contract, and are as material as the price of the work or the terms of payment; for the contract price was not to be paid until the barn was completed according to the specifications. It is not indispensable that the specifications be signed by the party to be charged, but it will be sufficient if they are referred to with certainty. *But where the reference is false, it cannot be helped out by oral evidence. Here the specifications were referred to as annexed to the contract, and when the plaintiffs were permitted to introduce in evidence, as the specifications referred to, a paper which they admitted was never attached to the contract, if they did not thereby contract, they added to its terms by oral evidence.*”

In *Willamette Etc. Co. v. College Co.*, 94 Cal. 229, at page 233, the court said:

“The insertion of this clause in the contract made the drawings and specifications an essential part thereof, as material as was the price of the work or the terms of payment; and until

they were 'annexed' to the contract so that its entire terms could be ascertained by mere inspection, and without oral testimony, the contract was only inchoate and not complete, and could not form the basis of a recovery."

The two cases from which the foregoing quotations are taken are approved in *Donnelly v. Adams*, 115 Cal. 129:

"The only distinction between the contract in the case at bar and those considered in the cases cited lies in the fact that in the present instance the reference is to specifications *signed* in the other it was to specifications *attached*. But the one reference is no less significant and essential than the other. If the specifications be not signed, or if they be not attached, in either case there is a false reference in a written contract which cannot be aided by parol evidence. In both cases the contract is left 'inchoate and not complete, and could not form the basis of a recovery'."

To the same effect see

Gilmore v. Lycoming Fire Ins. Co., 55 Cal. 123.

This same principle is applied in cases where an assignment is made for the benefit of creditors and reference is made to schedule attached, etc. Of course, it is held in these cases that in the absence of the schedule, the contract is rendered so indefinite and uncertain as to be unenforceable.

Woir v. Brown, 14 Barb. 39, 50;

Merchers v. Schloss, 49 How. P. R. 286.

The principle underlying all of these cases is that some of the terms and conditions of the contract

for convenience are not stated in the document itself, but in a document or documents attached and it is elementary that where the contract refers to another paper for some of its terms, the effect is the same as if the words of the paper referred to were inserted in the contract.

Adams v. Hill, 16 Maine 215.

The rule laid down by the foregoing authorities is obviously correct. Without the plans, specifications and detail drawings, it would be impossible to determine the sizes and weight (whether light or heavy) or the character of the various members. Observation of different modes of construction makes it plain that some buildings are of very heavy construction, while others are of the most frail construction.

To bring out in strong relief the uncertain and indefinite nature of this alleged contract, it is only necessary to put this inquiry: Suppose the defendant in error in this action had refused to furnish the materials particularly described in its proposal, and the plaintiff in error insisted that it was entitled to performance upon the part of the defendant in error, what structural material with reference to size, dimensions, character, etc., would the defendant be compelled to furnish? In the absence of plans, specifications and detail drawings, it would be impossible to determine just what would be required.

The facts of the case at bar make the above authorities and principles very pertinent. In none

of the cases cited is there such an absence of the elements essential to the original contract as in the case at bar. Even if the specifications were attached to the contract the difficulty would not be obviated because by the very terms of the specifications the drawing and specifications must co-operate. They are intended to co-operate with the drawings for the same, both those furnished by the architect and those furnished by the engineer and what is called for by either is as binding as if called for by both. They are intended to describe and provide for a finished piece of work.

(Tr. pp. 108-109.)

C.

To emphasize this point we might repeat all we have urged under our first question as under that heading we have discussed generally the questions that may be urged especially under subdivisions A, B, and C, but we leave this subdivision with the suggestion that the general references contained under the heading Question One are applicable to this point, and that even the vice-president of the defendant in error has sustained this point by his testimony in the following language:

“We cannot tell how to fabricate the steel until we have the design from the architect; until we have that design we don’t know what the members are going to consist of absolutely. If we were engineers we could, otherwise we cannot use our own judgment in a matter of that kind. We have to wait for the architect” (Tr. p. 225).

II.

THERE IS NO EVIDENCE OF GREATER DAMAGE, IF ANY, THAN THE VALUE OF THE STEEL DELIVERED, TO WIT: \$3021.90.

The authorities applicable to a case like this are numerous to the effect that the plaintiff is entitled to recover as damages the difference between the cost to him of performing the contract and the contract price.

Among the leading ones are:

Hinckley v. Pittsburg Bessmer Steel Co.,
121 U. S. 264;

U. S. v. Behan, 110 U. S. 338;

Sullivan v. McMillan, 8 So. 450 (Fla.);

Wells v. Association, 99 Fed. 222, 53 L. R. A.
33 (Extended note);

Goodrich v. Hubbard, 51 Mich. 63, 16 N. W.
232;

Nash v. Hoxie, 59 Wis. 384, 18 N. W. 408;

Singleton v. Wilson, 85 Tenn. 344, 2 S. W.
861;

Joske v. Pleasants, 39 S. W. 586;

Anvil Mining Co. v. Humble, 153 U. S. 540;

Tufts v. Weinfeld, 88 Wis. 653, 60 N. W.
992;

Crescent Mfg. Co. v. Nelson, 100 Mo. 337, 13
S. W. 505;

Black River Lumber Co. v. Warner, 93 Mo.
389, 6 S. W. 210;

Kingman Co. v. Hanna Wagon Co., 176 Ill.
553;

Williams v. Lumber Co., 118 N. C. 937, 24
S. E. 803.

The rule announced is subject to the qualifications that a reasonable deduction is to be made for the less amount of time required by the plaintiff, its employees and factory and for the release from trouble, risk and responsibility attendant upon a full execution of the contract on the part of the plaintiff.

Kimball v. Deere, 108 Iowa 685, 77 N. W. 1041-1044;

U. S. v. Speed, 8 Wall. 77;

McMaster v. State, 108 N. Y. 542, 15 N. E. 417.

In *Insley v. Shepard*, 31 Fed. 869, at page 873, the court said:

“The plaintiffs’ proof as to the amount of profits which they would have made by the performance of the work *is not disputed, or in any way contradicted by the defendants*; but the Court must assume that there should be a reasonable deduction from this theoretical amount of profit for a ‘*release from care, trouble, risk and responsibility, attending a full execution of the contract*’. The execution of the contract in question involved considerable risk. The piers which were to be erected by the contractors might have been washed out by a freshet in the river; a span, or some portion of their trestle work might have been destroyed by high water; there might have been delays by bad weather, or inability to procure material, to such an extent as to have very materially reduced the theoretical profits upon this contract. The figures of the plaintiffs’ witnesses are based on the assumption that there would be no drawbacks nor losses in the execution of the contract, when every

practical man knows that losses and delays are as a rule encountered in almost every contract like this. Hence I have concluded to take 30 per cent from the theoretical profits which the plaintiffs' proofs show they would have made by executing this contract for the performance of such work."

The evidence with respect to the damages alleged to have been sustained by the plaintiff is necessarily indefinite and uncertain, because of the absence of the plans, specifications and detail drawings and consequently the inability of any one to determine definitely the amount of steel which would be required for the building.

It has been seen that in some of the correspondence the plaintiff estimates that the amount of steel which would be required would be 1200 tons (Tr. p. 224; p. 227). At the time of the trial, in an effort to increase its possible recovery, witnesses of the plaintiff testified that the amount of steel which would be required was 1500 tons. The evidence on the part of the defendant shows that the drawings which had been received in evidence describing the tonnage, amounted to only 256 or 257 tons but that unless detail drawings were furnished, it could not be definitely determined just how much steel would be required and that "cubing" was a unreliable method of determining such quantity.

While there was some testimony offered by the defendant in error having a tendency to show loss of profits, if we assume it were possible to deter-

mine the tonnage of steel required, proof thereof was not "*clear and direct*", as is required.

In the case of *United States v Behan*, 110 U. S. 338, the facts were as follows: One Roy and the United States entered into a contract to improve the harbor of New Orleans, and later upon the contract with Roy being annulled, the surety on Roy's bond was authorized to fulfill the contract. He went to expense in providing machinery and materials and did a portion of the work when the government finally cancelled the contract. The claimant thereupon sold the materials on hand. The Court of Claims allowed him for his actual expenditures in the prosecution of the work, together with the unavoidable losses on materials. The government appealed on the ground that by making a claim for profits the claimant asserted the existence of the contract and could only recover nominal damages if he was unable to show that profits would have been made. The Supreme Court, however, speaking by Justice Bradley, in affirming the decision of the Court of Claims, said:

"The *prima facie* measure of damages for the breach of the contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damages, namely: first, what he has already expended toward performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. *The second*

item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when in the language of Chief Justice Nelson, in the case of Masterton v. Mayor of Brooklyn, they are the 'direct and immediate fruits of the contract,' they are free from this objection; they are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the enjoyment of any other stipulation.' Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such a remote and speculative character that they cannot be legally proved, the party is confined to his actual outlay and expense. This loss, however, he is clearly entitled to recover in all cases, unless the other party who has voluntarily stopped the performance of the contract, can show to the contrary."

In *United States v. Speed*, 8 Wallace (75 U. S.) 77, the plaintiff agreed to pack for the U. S. Government 50,000 hogs, which were to be furnished, together with materials for packing by the government. The government after furnishing some 16,000 hogs refused to furnish the remainder, although the plaintiff was ready to pack the same. Justice Miller, delivering the opinion of the court, said:

"And we do not believe that any safer rule, or one nearer to that supported by the general current of authorities, can be found than that adopted by the court, to wit: the difference between the cost of doing the work

and what claimants were to receive for it, making a reasonable deduction for the less time engaged, and for release from the care, trouble, risk and responsibility attending a full execution of the contract."

(In passing we may say that the court declined to so charge the jury, although expressly requested to do so by us.)

To entitle the plaintiff to recover damages in any specific amount, it was incumbent upon it in substantiating its claim of loss of profits, to show the cost to it of fabricating and handling the steel, and of course this could not be made in the absence of a showing of the quantity of steel which was required. Plaintiff's evidence of quantity had no real foundation, but was entirely based on estimates; in other words, one of the most essential items necessary to be considered was lacking. In this respect the case at bar is similar to *Sullivan et al., v. McMillan et al.*, 26 Fla. 543; 8 So. 450, which was an action originally brought by McMillan and Wiggins to recover damages for the breach of contract in and by which plaintiffs agreed to cut and deliver logs of specified dimensions. One of the questions involved in the case was the cost of delivering a large number of logs at the rate of 100 logs per day requiring deliveries extending over a period of two years. Referring to this question and speaking of the testimony of one of the plaintiffs as to what it would have cost to deliver the logs in question, the court said (8 So. 463);

“The absence from his statement of the number of teams it would have been necessary to keep on hand and employ to ensure their delivery of so many logs daily during so long a period is to our minds strong evidence in itself that he did not understand that he was speaking of such a proposition; but whether he did or not so understand we do not think his testimony was sufficient to justify a verdict upon the basis of the delivery of 100 or any other number per day; for when he proceeds to itemize the expenses of delivering, *he omits certain elements of expense which, in view of the items he mentions, suggests themselves, and independent of which no verdict approximating justice can be rendered.* Had the contract been performed in full the value of the use of the teams required for performance would have been an element of expense. When he ceased to perform, his expense ceased; his teams then became free to be used in any other venture, and were no longer employed in this; or, if he had been hiring them from other persons, the cost of their use would have ceased. It cannot be that the plaintiffs are to be better off than they would have been if they had performed the contract; yet if the value of the use of, or the cost of hiring, the oxen which would have been employed in the performance of the contract is not included as an expense, it is certain that less expense is estimated, and consequently greater profit allowed, than would have been in case of actual performance. This item of expense, and we do not say there are not others of the same kind, is necessarily shown by the fact that teams are proved to have been used in the performance of the contract. It is of course to be distinguished from any item of expense which those given do not suggest as necessarily attending the performance of the contract. It

is a patent defect in the testimony of the witness, and destroys it as the basis of a just or legal verdict, whatever the number of logs to be delivered daily was."

It is to be expected in a case of this kind, that the testimony on the part of defendant in error respecting anticipated profits would be quite full.

In this connection, we quote the language of the court in *Masterton v. Mayor*, 7 Hill 61; 42 A. D. 38, at page 45, where it was said:

"It is a very easy matter to figure out large profits upon paper; but as will be found, these, in a great majority of cases, become seriously reduced when subjected to the contingencies and hazards incident to actual performance. A jury should scrutinize with care and watchfulness any speculative or conjectural account of the cost of furnishing the article, that would result in a very unequal bargain between the parties, by which the gains and benefits, or, in other words, the measure of damages against the defendants, are unreasonably enhanced. They should not overlook the risks and contingencies which are almost inseparable from the execution of contracts like the one in question, and which increase the expense independently of the outlays in labor and capital."

Where the evidence shows actual damage, but fails to show with reasonable certainty the extent of such damage, plaintiff is entitled to nominal damages only.

R. R. Co. v. Town of Cicero, 157 Ill. 48,
41 N. E. 640;

Hudson v. Archer, 9 S. D. 240, 68 N. W. 541.

The evidence in this case does not measure up to the standard fixed by the above decisions. There is no evidence to prove that there would have been any profits in the alleged contract. On the contrary, it affirmatively shows that on performance of the contract the plaintiff would have made little or no profit.

In this case every element of certainty is absent and every element of conjecture, speculation and guesswork is present.

(a) The number of tons of steel required must be shown by defendant in error. It failed. There were no drawings by which it could be shown, so the witnesses indulged in guessing. None of them ever attempted to take the quantities. They could not be taken as there were no drawings. The value of S. B. Harding's testimony is destroyed because he bases his estimate "on talk" he heard and previously in two letters he had guessed "about 1200 tons". Frederick W. Hoffman on cross-examination said: "*I said it would take 1500 tons of steel because I just estimated that on past experience with other buildings and passed my judgment on the specifications and what they called for. It was only an estimate*" (Tr. p. 178). With this cross-examination before us, the testimony is valueless. It is hardly to be characterized as more than "mere conjecture". F. W. Harding also guessed, but admitted that he never took quantities, nor was he called to remember them (Tr. p. 182) and

then destroyed the "guess" by testifying that until the architectural design is made you cannot know the character of the members of which the building will consist (Tr. p. 225). Therefore, he agrees with the testimony of the structural engineers to the effect that until the architectural design is prepared the tonnage cannot be determined (Tr. pp. 248, 241, 234, 235).

(b) As the tonnage cannot be ascertained, the contract price cannot be ascertained.

(c) It is plainly evident that the defendant in error "guessed" at its damages and relied upon the inexperience of the plaintiff in error to aid it in securing the enormous amount it demanded. This is demonstrated by the different amounts claimed at the different times as shown above. Every officer of the defendant in error estimated the damages in a different amount. In the first estimate, the sum of \$30,230 was claimed and the large amount of \$20,-606.47 was itemized as "unused shop space". In the second estimate, this amount was similarly labeled, while in the third estimate it was designated as "loss of profits". In the letter written by the secretary of the defendant in error, the damages were fixed at \$30,931.23. In reaching this estimate, not only the cost of the raw material and of fabricating the steel were included, but also certain percentages of the various costs entering into the work were also added. These percentages were classified as "overhead expenses". Overhead expenses are

defined in the testimony of S. B. Harding (Tr. p. 169) as follows:

“Q. Your overhead expense, as I understand it, is for the general management of the business of the Modern Steel Structural Company, applying to all contracts and all work being done by that company?”

A. Yes, divided proportionally.”

By the testimony of Samuel B. Harding, the damages claimed by the defendant in error *without allowing any portion of the overhead expense* as part of its cost were fixed at \$34,470 (Tr. p. 156); the damages fixed by Mr. Simpson, the Secretary of the Company, in his letter of October 15th, 1907, and in which he allowed as part of the cost of doing in the work a proportion of the overhead expense, were \$30,931.23 (Tr. pp. 211-222).

It is admitted that the overhead expense of the defendant in error during the time the contract in question was being fulfilled by it, amounted to \$86,055.76 annually, or \$7171.23 per month (Tr. p. 164), and that one-third of the plant of defendant in error for a period of from sixty to ninety days would be used in completing the contract in question (Tr. p. 171). Hence the overhead expense that should be charged against this work would be at least \$7171.23, but the lower court, under its rulings prevented the overhead expense being considered as part of the cost of the work notwithstanding that Samuel B. Harding testified that every item of

overhead expense bore on the cost of doing this work (Tr. pp. 163-164).

The extreme difficulty that defendant in error experienced in trying to ascertain the damages it sustained, if any, demonstrated that it was "speculating", "conjecturing" or "guessing" at its damages. At first it demanded \$30,230 (Tr. p. 138). Although it had several days to figure that amount it wrote under date of October 15th, 1907 (Tr. p. 211), that the above figures were made up "somewhat hurriedly", and corrected them by fixing its damage at \$30,931.23. It changed this amount when it filed its first complaint herein to \$30,881.23 (Tr. p. 10) and again it changed it in its final complaint to \$35,164.17 (Tr. p. 47). The two witnesses who figured out the damages at the trial—S. B. Harding and F. W. Harding, neither one charging any part of the "overhead expenses" of defendant in error against this contract—differed greatly. S. B. Harding fixed the damages at \$34,470 (Tr. p. 156) while F. W. Harding said \$29,637 (Tr. p. 186).

This evidence indicates that there were no damages except for the work done and that the telegraphic demand for \$30,230 was made on the expectation that the "inexperience" of the plaintiff in error would cause its payment without investigation. When the plaintiff in error asked for details then came the long letter of October 15th, 1907 (Tr. p. 211) in an effort to sustain this outrageous demand. In that letter, in its effort to bolster up

its claim for damages it added the following "overhead charges":

Plus 15% drawing general	\$202.50	
Shop labor at .24cts. per 100#	7200.00	
Plus 60% shop general	4320.00	
	<hr/>	
	\$11,722.50	
Plus 15% Office & Sol. Genl.	1960.87	\$13683.37
	<hr/>	
Plus 1/2% Business General		68.41
		<hr/>
		\$13751.78

Also an estimated profit of \$20,606.47 (Tr. p. 217).

But on the trial it vigorously contended that "overhead expenses" although part of its cost in doing this work should not be added to the cost of this contract in ascertaining its damage. This is a decided change of front. The "overhead expenses" of defendant in error amounted to \$7171.23 monthly (Tr. p. 164) and if the court had allowed the jury to consider them, there would have been no profits and the verdict would have been only for the money expended by defendant in error in the performance of its contract, to wit, \$3021., the value of the steel delivered. This figure is almost reached by deducting the above sum of \$13,751.78, the total overhead expenses from the verdict of the jury:

Verdict	\$17,372.00
Overhead expenses	13,751.78
	<hr/>
	\$3,620.22

THE EVIDENCE SHOWS WITHOUT CONFLICT THAT DEFENDANT IN ERROR WOULD NOT HAVE MADE ANY PROFIT—BUT WOULD HAVE LOST MONEY—IF THE CONTRACT HAD BEEN PERFORMED.

We shall demonstrate by the testimony of the witnesses of defendant in error that it would not have made a profit—but would have lost money if the contract had been performed, and that the attempt to procure profits was an effort to coin the misfortunes of plaintiff in error into false profits for the defendant in error.

In this demonstration we shall use the records and the testimony of the defendant in error.

During the taking of the deposition of S. B. Harding at Waukesha, plaintiff in error obtained a copy of the cost sheet of the work covered by the alleged contract in this suit. This deposition was taken more than two years before the trial. The fact that plaintiff in error had a copy of this record was forgotten until it was produced in court during the cross-examination of witness F. W. Harding at the close of the case of defendant in error and its real effect will be more clearly apparent now. This cost sheet in connection with the testimony of witnesses for defendant in error proves to a mathematical certainty that the work under this contract could not have been finished at a profit.

In cases of this kind it is most difficult to meet the claim for damages. The claimant asserts that its cost for doing the work would be a certain figure

which cannot be disputed except by its own books which are so involved as to add to the general confusion. If you prove the cost to another firm for doing the work the claimant usually answers that his methods, or something else, reduces the cost. Here by a chance of kind fortune, we are able to destroy the unwarranted claim by the records and sworn testimony of the claimant.

The cost sheet of the Modern Steel Structural Company (defendant in error) for the contract in question is printed in the record (Tr. p. 205) but through the inadvertence of the printer it is headed "*Ledger Sheet American-Pacific Construction Company*". This error will be corrected at the oral argument.

In this cost sheet are included all the cost incurred by the Modern Steel Structural Company (defendant in error) in performing the alleged contract.

"I hand you this (referring to above cost sheet) and ask you if that is not a copy of the detailed cost sheet of your work for the 39 $\frac{1}{4}$ tons?

A. No, sir; *I should say not. It includes all the work done on this contract up to a certain date. It includes some draughting, office labor and shop labor and freight charges not solely relating to the 39 $\frac{1}{4}$ tons.*

There is nothing that I see that sets out the work but I know by our general methods of cost keeping that the records of all the work of every nature on the contract would go into the office and naturally this would be the record of this contract and all that we did up to that date."

Q. "Is that a copy of your ledger showing the work done, the drawing labor, the fabrication, or rather, the shop cost?

A. It seems to be.

Q. Is there any question about that being a copy of the page from your ledger?

A. No, there is no question.

Q. And the page of the ledger that refers to this contract, the contract with the American-Pacific Construction Company?

A. Yes.

Q. When you receive a contract you give it a number.

A. Yes.

Q. What is the number of the American-Pacific contract?

A. 561.

Q. That is a record of the work done under that contract?

A. Yes."

(Cross-examination F. W. Harding, Tr. p. 203.)

"Q. Do you know whether or not that ledger account was closed and when it was closed?

A. Closed, and possibly shown right here. I should say after that part of the work was performed (referring to entry on exhibit 'B'). We have not entered on that account there what the American-Pacific Construction owes us.

Q. You mean for future profits that you would have earned if that contract was carried out?

A. We are carrying such an account on our books.

Q. Which account includes what you estimate would be your profit? That account was closed when this litigation began by the notation on it 'in litigation'?

A. This account was closed.

Q. In so far as entries being made upon it?

A. Yes.

Q. And entries were made upon that account up to the time this litigation began?

A. Of this nature."

(Recross examination of F. W. Harding, Tr.
p. 230.)

"Redirect Examination.

Mr. TAYLOR. Q. Mr. Harding, the sheet that you have presented here presents the actual items you have paid out as costs. Is that correct?

A. Yes.

Q. And does not embrace the damages by reason of the breach of contract?

A. No, sir.

Q. There is nothing stated in that about a breach of contract?

A. No, sir."

(Redirect examination of F. W. Harding, Tr.
p. 231.)

Hence this sheet represents the actual cost to defendant in error of all work done by it under the contract in question.

No steel was fabricated other than the 39 $\frac{1}{4}$ tons shipped to the plaintiff in error.

(Cross-examination F. W. Harding, Tr. bottom pages 230-231.)

Consequently we seek to know the cost of the work that did not relate solely to said 39 $\frac{1}{4}$ tons. The answer is in the record: "It includes some draughting, office and shop labor and freight charges not solely relating to the 39 $\frac{1}{4}$ tons" (Tr. p. 203).

To obtain its cost for the $39\frac{1}{4}$ tons we must deduct the other items of cost.

The cost sheet shows that the entire freight and cartage included therein is \$9.73 (Tr. p. 205) and Mr. S. B. Harding, president of defendant in error, contradicts Mr. F. W. Harding as he testified the charge of \$9.73 was for cartage on the $39\frac{1}{4}$ tons (Tr. p. 160). However we shall accept the version most favorable to defendant in error and omit it from the cost of $39\frac{1}{4}$ tons. The only other work done under the contract was the preparation of some templates.

“Q. It is also a fact, is it not, that the only work that you did under this contract was the fabrication of $39\frac{1}{4}$ tons of steel?

A. Yes; and the preparation of some templates, etc., for the plans.

Q. Then, I understand that the entire work that has been done by the Modern Steel Structural Company under this contract consist of the fabrication of $39\frac{1}{4}$ tons of steel, which you delivered to the American-Pacific Construction Company at San Francisco, California, the preparation of drawings for the $39\frac{1}{4}$ tons of steel which have been delivered and for work that you expected to do and the preparation of templates for the work that was delivered and for future work?

A. Yes, and the ordering of steel.

Q. Now, is there any cost to the ordering of steel?

A. We do that with our office force under the head of ‘overhead expenses’ ” (Tr. p. 162).

The insignificance of the cost of templates is apparent from the testimony of F. W. Harding (Tr. p. 183; p. 185).

Only drawings for 262 tons of steel were prepared and templates could not be made for more tonnage than there were drawings finished (Tr. p. 183) and the templates for the difference in tonnage between 262 tons and 1500 tons or 1238 tons would be only \$32 (Tr. p. 185) and the labor would be inconsiderable. Only 161¼ tons of steel were delivered to the works of defendant (Tr. p. 167).

Two facts established beyond all question are:

1st. Thirty-nine and one-quarter tons of steel for office building were fabricated and delivered.

2nd. Drawings were finished for 255 tons and no more.

Testimony of F. W. Harding, Tr. p. 201; p. 183; p. 206.

Testimony of W. M. Breite, Tr. p. 237.

Testimony of P. Zucco, Tr. pp. 256-257.

This is not disputed.

On the basis of 1200 tons, this would be, according to Mr. Breite, one tenth of all the drawings to be done.

Tr. p. 237.

This is likewise not disputed.

By the cost sheet this drawing labor (without overhead) is shown to have cost \$669.28 for one tenth of the work, and the whole would have cost on that basis \$6,692.80. (For the present we are not taking the theatre at \$5.00, the price per ton

all agree that drawing labor for a theatre would cost.)

By the same cost sheet, the shop labor for $39\frac{1}{4}$ tons is \$328.64 (without overhead), or \$8.37 per ton, which is about the price all experts agree the shop labor is worth.

But Mr. F. W. Harding says there was other shop labor included in those figures. But what could it have been?

S. B. Harding's testimony is:

“Q. It is also a fact, is it not that the only work that you did under this contract was the fabrication of $39\frac{1}{4}$ tons of steel?

A. Yes; and the preparation of some templets, etc., for the plans.

Q. Then, I understand that the entire work that has been done by the Modern Steel Structural Company under this contract consists of the fabrication of $39\frac{1}{4}$ tons of steel, which you delivered to the American-Pacific Construction Company at San Francisco, California, the preparation of drawings for the $39\frac{1}{4}$ tons of steel which had been delivered, and for the work that you expected to do, and the preparation of templets for the work that was delivered and for future work?

A. Yes. And the ordering of steel.

Q. Now, is there any cost to the ordering of steel?

A. We do that with our office force under the head of overhead expenses” (Tr. p. 162).

F. W. Harding says:

“Mr. HUMPHREY. Q. Did you fabricate any work other than you shipped to us?

A. On this contract?

Q. Yes.

A. No, sir, I do not believe that we did fabricate any other" (Tr. p. 203).

Now, if they did not fabricate any but $39\frac{1}{4}$ tons, the other shop labor must be for handling the difference between $161\frac{1}{4}$ tons and $39\frac{1}{4}$ tons, or 122 tons (Tr. p. 167).

The cost of handling is 13 cents per ton (Tr. bottom p. 159).

The cost of handling the 122 tons would be \$15.86. Deducting this from \$328.64, we have \$312.78 as the shop cost of the $39\frac{1}{4}$ tons, save a small deduction for some templates that were made. This item appeared so small that it was not mentioned. It appears that the making of templates is the smallest portion of the shop labor. However, we shall deduct from our above showing of \$8.37 per ton for shop labor cost \$0.37 as a most liberal allowance per ton for labor in making templates, and we then have the following:

Drawing Costs.

\$669.28	(all work)	Breite's testimony 256
		tons, but $\frac{1}{10}$\$6692.80
		of drawing work of job.

Shop Labor.

328.64	$39\frac{1}{4}$ tons	(all that was fabricated),
--------	----------------------	----------------------------

or

$39\frac{1}{4}$)	328.64	=	\$8.37	but by the allowance
—————				of 37 cents as above
				the shop cost per ton
				is \$8.00.

Assuming office part only 50 per cent of the entire building—and all agree it was at least 50 per cent thereof,—and basing cost on their own letters, dated February 12th, 1907, marked Exhibit “E” and “G” (Tr. pp. 224-227), which estimates job at 1200 tons, we find

\$8.00 per ton

600 tons office part

\$4800. shop cost office portion

Theatre portion cost 50 per cent more (Snyder, Breite and Zucco). Harding agrees it would be more (Tr. p. 202).

Office\$ 4,800.00

Theatre 7,200.00

Total shop cost..... 12,000.00

Total drawing cost..... 6,692.80

\$18,692.80

Freight on 1200 tons at

\$15.00 per ton..... 18,000.00

1200 tons steel at \$38..... 45,600.00

\$82,292.80

Add \$4.10 per ton for

drawing labor for thea-

tre portion 2,460.00

\$84,752.80

\$84,752.80 Total cost.

1200 tons steel at 77=\$92,400.00

Total cost as above..... 84,752.80

\$ 7,647.20 apparent profit
on Plaintiff's
own figures.

Hence on their own figures, without "overheads", wear and tear on machinery, cost of drawing paper, wood, paint, brushes, power, etc., they only show a profit of \$7,647.20. Make deductions for depreciation, cost of materials for drawing, for templates, cost of power, allowance for exemption of risk and trouble, time saved and this apparent profit would be swept away. If you deduct \$7171.23 (Tr. p. 164) one-third of the overheads for three months as the performance of the contract would require one-third of the plant of defendant in error and its force for three months, the apparent profit becomes a loss of \$524.03 and includes payment of the contract price for the steel (39¼ tons) delivered. In these figures we have taken the cost of drawing labor for a theatre at \$4.10 per ton; while even W. F. Harding figures it at \$5.00 per ton (Tr. p. 254).

Take the figures of the other experts and defendant in error would have lost a great deal more.

Plaintiff's letters written before the breach confirm this:

"You will remember the night the writer made out the pencil form, he said that the

work was worth \$77 and we discussed where you would get the other \$2.00 above the \$75.00.

"No, if you can buy this job one cent cheaper anywhere *we will be very much pleased to relieve you of the obligation to us*" (Tr. p. 188).

"If you desire to buy the job elsewhere and not give the \$77, we would be *very much pleased to release you, only asking you to pay for what we have already done*" (Tr. p. 189).

"He admitted that he did, and the writer said to him that we regretted that there was any misunderstanding between yourself and the writer as we felt in the whole transaction *that we were more carrying out the obligation made by G. W. Harding of Los Angeles than anything else as we were so filled up with work, and the writer further said that we would be pleased if we could sublet it to some one and get out even and at the same time serve you, but if we could not we were going to stick by and fill the order*" (Tr. p. 196).

The plaintiff had no certain basis upon which to base its claim. On October 15, 1907, it wrote that it was damaged in the sum of \$30,230.00, but the elements of its damage then were quite different than the elements urged in this action.

If the plaintiff itself could not even state the elements of its damages, how could the jury do more than follow plaintiff's example and merely guess? Apparently that was done, and the verdict resulted from guesswork.

The claim for damages varied as the necessities of the case varied. In 1907, when it believed that its damages were to be measured by the value of unused shop space, and also by the amount which

would be required to perform the contract, its figures representing these items and its costs were large. When, however, it was advised that its measure of damages would be the difference between the cost of performing the contract and the amount it was to receive for the performance thereof, it became important for it to show that the cost of performing was much less so as to increase its alleged profits.

III.

VARIANCE.

(a)

The complaint alleged a contract for the fabrication and delivery of an *agreed amount* of steel, to wit: 1500 tons (Tr. p. 44). There was no proof of any contract or agreement. Opinions and "guesses" of the amount of steel that would be required for unfinished and probably unconceived drawings and a writing was received in evidence that absolutely negated the idea of an agreement on the amount of tonnage.

(b)

The allegations were that the deliveries under the contract were to be made by September 1, 1907 (Tr. pp. 43-44).

There was no evidence offered of such a contract. On the contrary, the only evidence showed that deliveries were to be made:

DELIVERY: As follows: That portion indicated by Mr. Smedberg shown within red lines on blue print, 3-S, 4-S, 7-S, dated by us on the back of print as received Dec. 31, and 8-S, dated by us on the back of print as received January 3, 1907, required to begin the erection of steel work on stores, to be shipped from our shop thirty days from our receipt of approved working detail drawings, signed by Mr. Smedberg.

Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg from date of approval (Tr. pp. 2-3).

This is a complete variance and sufficient to defeat the claim of defendant in error.

IV.

UNDER THE TERMS OF THIS PROPOSAL OR CONTRACT IT WAS NECESSARY FOR THE DEEFNDANT IN ERROR TO SUBMIT TO ARBITRATION ITS CLAIM BEFORE INSTITUTING THIS ACTION.

The provisions of the contract in this action is as follows:

“In case any difference of opinion shall arise between the parties to this contract, in relation to the contract or work to be done, or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract and these two persons shall have the power to name an uninterested umpire, whose decision shall be binding on all the parties to the contract.”

In *Holmes v. Richet*, 56 Cal. 312, the Supreme Court of that State said:

“By the terms of the contract, authority was given the architect to decide any dispute that might arise respecting the true construction and meaning of the drawings or specifications and upon all such questions his decision should be final; but upon the question of extra work, he was not authorized to decide. On the contrary, by the express terms of the contract, such disputes, were to be referred to two competent persons, and if they could not agree, the services of an umpire were to be invoked. Was it competent for the parties to make such a stipulation? It has been frequently decided, and now seems to be the settled law, that an agreement to refer a case to arbitration will not be regarded by the courts, and they will take jurisdiction and determine a dispute between parties notwithstanding such an agreement. But that is not this case. Here the parties simply agreed that the amount or value of certain extra work should be fixed in a certain manner, and was there any right of action in this case for and on account of said extra work until the value thereof was fixed according to the terms and conditions of the contract? In other words, was it not a condition precedent to any right of action, that the value of the extra work should be determined in the mode provided by the contract? This question was very elaborately considered by the Court of Appeals of New York, in the recent case of *The President, etc. v. The Pennsylvania Coal Company*, 50 N. Y. 250. The Court there says: ‘The distinction between the two classes of cases is marked and well defined. In one case, the parties undertake by an independent covenant or agreement to provide for an adjustment and settlement of all

disputes and difference by arbitration, to the exclusion of the Court; and in the other they merely by the same agreement which creates the liability and gives the right, qualified the right by providing that, before any right of action shall accrued, certain facts shall be determined, or amounts and values ascertained and this is made a condition precedent, either in terms or by necessary implication. This condition being lawful, the Courts have never hesitated to give full effect to it. * * *

Conclusion.

Plaintiff in error respectfully submits that the judgment should be reversed for the following reasons:

First. There was no valid contract.

Second. There was no damages proved.

Third. There was a fatal variance between the allegations and the proofs.

Fourth. The action was premature as the alleged contract, if a contract, provided within its own terms a means of settling the very points involved in this action.

Respectfully submitted,

WILLIAM F. HUMPHREY,
Attorney for Plaintiff in Error.

LENT & HUMPHREY,
Of Counsel.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

AMERICAN-PACIFIC CONSTRUCTION COMPANY, a Corporation,

Plaintiff in Error,

VS.

MODERN STEEL STRUCTURAL COMPANY, a Corporation,

Defendant in Error.

BRIEF FOR DEFENDENT IN ERROR

SENECA N. TAYLOR,

WRIGHT & WRIGHT & STETSON,

Attorneys for Defendant in Error.

Filed this day of October, 1913.

FRANK D. MONCKTON, *Clerk.*

....., *Deputy Clerk.*

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

AMERICAN-PACIFIC CONSTRUCTION COMPANY, a Corporation,

Plaintiff in Error,

VS.

MODERN STEEL STRUCTURAL COMPANY, a Corporation,

Defendant in Error.

No. 2272

BRIEF FOR DEFENDENT IN ERROR

STATEMENT OF THE CASE.

This suit was instituted in the Circuit Court of the United States, Ninth Circuit, Northern District of California, April, 1908, on a complaint filed by defendant in error, hereinafter called plaintiff, against plaintiff in error, hereafter called defendant, claiming damages for breach of contract, in the sum of thirty thousand eight hundred eighty-one and 23/100 dollars (\$30,881.23). Defendant was served with process and appeared and demurred to the complaint.

Subsequently various other pleadings were filed in the case, by plaintiff, and by defendant; but the rulings of the court on these, cast no light on the issues before this court, as no exceptions were saved as to such rulings.

June 22, 1911, the plaintiff by leave of court filed a second amended complaint, against the defendant which, omitting the caption, signatures and verification, reads:

"Comes now the plaintiff in the above-entitled cause, and, by leave of court, files this, its second amended complaint, and avers that at all the times hereinafter mentioned it was and still is a corporation, organized under the laws of the State of Wisconsin, and a resident and citizen of the State of Wisconsin; that at all the times hereinafter mentioned the defendant was and still is a corporation organized under the laws of the State of California, and a citizen of California, and at all of said times having its principal office, residence and domicile in the City of San Francisco in said District and that the matter in dispute in this cause, exclusive of interest and costs, exceeds the sum of twenty thousand dollars.

**"AND PLAINTIFF, FOR ITS CAUSE OF
ACTION, AVERS:**

I.

"That on or about the 19th day of January, 1907, plaintiff and defendant entered into a contract by the terms of which plaintiff agreed with the de-

fendant to furnish material for and to fabricate all the structural steel and iron required by the plans and specifications, as the same then indicated, for the new building to be erected by the defendant for the Richelieu Realty Syndicate, known as the 'Columbia Theatre,' on lot of land situated on the southeast corner of Geary Street and Van Ness Avenue, in the City and County of San Francisco, and to deliver said material, when so fabricated to defendant f. o. b. cars, San Francisco, California, at the agreed price of seventy-seven dollars (\$77.00) per ton; that the quantity of such structural steel and iron required for said building about to be erected and which plaintiff sold to the defendant for future delivery was estimated at fifteen hundred (1500) tons and that by said contract plaintiff agreed to deliver all such material to defendant before September 1, 1907.

II.

"That by the terms of said contract defendant purchased from plaintiff for future delivery and agreed to accept from plaintiff the quantity of structural steel indicated and called for by the plans and specifications for said building, which quantity it was mutually agreed between plaintiff and defendant, was about fifteen hundred tons (1500); that said defendant, at said time, was under contract with the owners of said new building for the erection thereof, and defendant agreed to accept from plaintiff and pay plaintiff for all said structural steel and iron seventy-seven dollars (\$77.00) per ton upon such deliveries.

III.

"That at all the times mentioned in this complaint, plaintiff owned and operated at Waukesha, Wisconsin, a modern well-equipped factory designed for and used by plaintiff in the fabrication of structural steel and iron of the kind and character mentioned in said contract; that immediately after the execution of said contract plaintiff began carrying out its part of the same and made shop drawings, contracted for raw material out of which to manufacture such structural steel and iron, and fabricated thirty-nine and a quarter ($39\frac{1}{4}$) tons of such material in conformity with the plans and specifications, and forwarded the same to defendant by rail, f. o. b. cars San Francisco, California, which defendant accepted and applied upon said contract, and which tonnage at seventy-seven (\$77.00) dollars per ton aggregated the sum of three thousand twenty-one dollars and nine cents (3021.09) and that defendant has wholly neglected and refused to pay the same, or any part thereof.

IV.

"That plaintiff, in all things, kept and performed the stipulations by it to be performed by the terms of said contract until the defendant breached the said contract, as herein stated, and that plaintiff, at all times after said contract was entered into, stood ready, willing, able and anxious to carry out said contract and would have done so had it not been prevented by defendant from doing so.

V.

"That on or about the — day of April, 1907, defendant ordered plaintiff to do no more work and ship no more material under said contract, as the erection of said building had been abandoned and defendant positively refused to accept any more of said fabricated material if shipped.

VI.

"That defendant has not paid plaintiff anything upon said contract, nor damages for breaching the same, nor for the thirty-nine and a quarter ($39\frac{1}{4}$) tons of structural steel and iron delivered to the defendant and accepted by the defendant on said contract; that had the defendant not breached said contract, plaintiff could and would have carried out said contract and received from the defendant for the fifteen hundred (1500) tons of structural steel and iron aforesaid seventy-seven dollars (\$77.00) per ton, or one hundred and fifteen thousand five hundred dollars (\$115,500.00); that at the date defendant breached said contract, as aforesaid, and ordered the plaintiff to cease work under it, the cost to plaintiff to have completed said contract in every particular, including the market value of the raw material, labor and freights and the delivery to the defendant of the remaining one thousand four hundred and sixty and three-quarters ($1460\frac{3}{4}$) tons of said structural steel and iron, f. o. b. cars San Francisco, California, would not have exceeded the sum of eighty thousand three hundred thirty-five dollars and eighty-three cents (\$80,335.83) and this last de-

ducted from the contract price of one hundred and fifteen thousand five hundred dollars (\$115,500.00) would have left a profit accruing to plaintiff of thirty-five thousand one hundred and sixty-four dollars and seventeen cents (\$35,164.17); that the items making up said eighty thousand three hundred thirty-five dollars and eighty-three cents (\$80,335.83), cost to have completed the said contract, consisted of the following items, to-wit:

"To cost for drawing labor in drawing room	\$ 680.72
To cost of shop labor in the factory..	6,871.36
To freights for carrying 1460¾ tons of structural steel and iron from Waukesha, Wisconsin, to San Francisco, California	21,911.25
To cost of rolled material not fabri- cated, delivered at the factory at Waukesha, Wisconsin, in a quan- tity sufficient to fulfill the contract —122 tons on hand, balance 1338¾ tons at \$38.00 per ton.	50,872.50
Total	<u>\$80,335.83</u>

"That said sum of thirty-five thousand one hundred sixty-four dollars and seventeen cents (\$35,164.17) includes the three thousand twenty-one dollars and nine cents (\$3,021.09) for the fabricated material above specified which was delivered by plaintiff to the defendant and not paid for by the latter.

VII.

"That plaintiff has been injured and has suffered damages by reason of said breach of said contract by the defendant in the sum of thirty-five thousand one hundred sixty-four dollars and seventeen cents (\$35,164.17), in the manner as aforesaid, and that since said contract was breached by said defendant, as aforesaid and before this suit was instituted, plaintiff demanded payment of said damages, but defendant has refused to pay the same, and never has paid the whole or any part thereof.

"WHEREFORE, plaintiff prays judgment for the sum of thirty-five thousand one hundred sixty-four dollars and seventeen cents, together with interest and costs of suit." (Record, pp. 42-43-44-45-46-47.)

Defendant demurred to this complaint, same being overruled, it then filed an answer, but this answer was abandoned and an amended answer to said second amended complaint was filed, which, omitting the caption, signatures and verification, reads:

I.

"Defendant avers it has no information or belief upon the subject sufficient to enable it to answer part of the allegations in the opening part of said second amended complaint, and placing its denial on that ground denies that the plaintiff above named is, or was at all the times herein or in said second amended complaint mentioned, or now is, a corporation organized or existing under or by virtue of the laws of the State of Wisconsin, or of

any other State, or is a resident or citizen of the State of Wisconsin.

II.

"Denies that on or about the 19th day of January, 1907, or on or about any other date, plaintiff and defendant, or plaintiff or defendant, made or entered into any contract; denies that plaintiff and defendant or plaintiff or defendant entered into a contract in substance as, or in any particulars as, or at all as set forth in paragraph 1 of plaintiff's second amended complaint.

"Denies that on or about the 19th day of January, 1907, or at any other time, plaintiff and defendant, or plaintiff or defendant, entered into a contract by the terms of which or by any term of which, plaintiff agreed with the defendant to furnish material for, or to fabricate all or any structural steel and iron, or either, required by the, or any, plans and specification, or either, as the same then or ever, indicated for the new building to be erected by the defendant for the Richelieu Realty Syndicate. Denies that defendant erected or was to erect, or that there was to be erected by it a new building for the Richelieu Realty Syndicate either at the south-east corner of Geary Street and Van Ness Avenue, in the City and County of San Francisco, or elsewhere. Denies that said plaintiff agreed to deliver said or any material when so fabricated, or at any time, to defendant f. o. b. cars San Francisco, California, at an agreed or other or any price of seventy-seven dollars per ton; denies that the quantity of said structural steel and iron or

either required for said, or any, building, about to be erected or which plaintiff sold to the defendant for future delivery, or otherwise, was estimated at fifteen hundred tons, or at any amount whatsoever; denies that plaintiff sold or agreed to sell to the defendant any structural or other steel and iron, or either, for future delivery or otherwise; denies that by said alleged contract or any contract plaintiff agreed to deliver all or any of such, or any, material to defendant before September 1, 1907, or any other time.

III.

“Denies that by the terms of said or any contract, defendant purchased from plaintiff for future delivery, or at all, or agreed to accept from plaintiff the or any quantity of structural or other steel indicated or called for by the plans and specifications, or by the plans or specifications for the building referred to in said second amended complaint, or by any plans and specifications, or plans or specifications; denies that any quantity was mutually or otherwise agreed between plaintiff and defendant, or that the quantity mutually or otherwise agreed between plaintiff and defendant was about fifteen hundred tons, or any tons or amount whatsoever; denies that said defendant at said time was under contract with the owners of said new building for the erection thereof; denies that defendant agreed to accept from plaintiff or pay plaintiff for all said structural steel and iron, or either thereof, seventy-seven dollars, or any other price per ton upon such deliveries or at all.

IV.

“Defendant has no information or belief upon the subject sufficient to enable it to answer the allegations in plaintiff’s complaint about plaintiff’s ownership and operation of a plant at Waukesha, Wisconsin, and placing its denial on that ground, denies that plaintiff owned or operated at Waukesha, Wisconsin, or elsewhere, a modern or well equipped or any factory designed for or used by plaintiff in the fabrication of structural or other steel or iron, of the kind or character mentioned in said alleged contract, or any contract; denies that immediately or at all after the execution of said or any contract plaintiff began carrying out or carried out its or any of its part of the same or of any contract, or made shop or any drawings or contracted for raw or other material out of which to manufacture such structural or other steel or iron, or anything; denies plaintiff fabricated thirty-nine and one-quarter tons of such or any material in conformity with the said plans and specifications or either or otherwise; denies plaintiff forwarded the same to defendant by rail f. o. b. cars San Francisco, California, or otherwise; denies defendant accepted or applied upon said or any contract, or otherwise said thirty-nine and one-quarter tons or any of such, or any material; denies that said or any tonnage accepted or applied by this defendant or forwarded to this defendant aggregated three thousand twenty-one dollars and nine cents; denies that said or any tonnage was forwarded to, or accepted or applied upon said or any contract or otherwise, by this defendant.

V.

“Denies that plaintiff, in all or any things, kept or performed the stipulations or any of the stipulations by it to be performed by the terms of said contract, or otherwise; denies that plaintiff in all or any things kept or performed the stipulations or any of the stipulations by it to be performed by the terms of said contract or otherwise, until the defendant breached the said contract as herein, or elsewhere stated; denies that this defendant ever breached said or any contract; denies that said plaintiff at all times, or at any time before or after said contract was entered into, stood ready or was ready, willing, able or anxious to carry out said or any contract or would have done so had it not been prevented by defendant from doing so; denies that plaintiff was prevented by defendant from carrying out said or any contract; denies that plaintiff was ready, able, willing or anxious to carry out said alleged or any contract.

VI.

“Denies that at any time defendant ordered plaintiff to do no more work or ship no more material under said or any contract for the reason that the erection of said building had been abandoned or for any reason; denies that defendant positively or at all, refused to accept any or any more or any of said or any fabricated or other material if shipped, or otherwise.

VII.

“Denies that there is or ever was any contract upon or by which defendant was to pay plaintiff anything; denies defendant ever breached said or any contract; denies plaintiff was damaged by any breach of said or of any alleged contract; denies plaintiff ever delivered, or defendant ever accepted said thirty-nine and one-quarter tons or any amount of structural steel or iron on said contract, or otherwise; denies that defendant breached said or any contract; denies that had said alleged contract not been breached, or had not the alleged breach occurred, plaintiff could or would have carried out said or any contract or received from defendant for fifteen hundred tons of structural steel or iron, seventy-seven dollars or any sum per ton, or one hundred and fifteen thousand five hundred dollars, or any other amount; denies that plaintiff could or would have delivered said fifteen hundred tons, or any amount whatsoever.

“Denies defendant breached said contract or ordered plaintiff to cease work under it; denies that at the date it is alleged plaintiff breached said alleged contract, or ordered plaintiff to cease work under it, or at any other time, the cost to plaintiff to have completed in every or any particular either including or excluding the value of the raw material, labor and freights, or any, and the delivery to the defendant of the alleged remaining one thousand four hundred and sixty and three-quarters tons of said alleged structural steel and iron f. o. b. cars San Francisco, California, would not have exceeded the sum of eighty thousand three

hundred thirty-five and eighty-three cents, or would not have exceeded the sum of \$84,971.83; denies that there was a contract price or that the contract price was or is one hundred and fifteen thousand five hundred dollars; denies that in any circumstances or under any conditions, plaintiff under or by the performance of said contract would have made, or there would have been a profit of thirty-five thousand one hundred and sixty-four and seventeen cents, but, on the contrary, defendant avers that if plaintiff had fulfilled and carried out said alleged contract, it would have lost a large sum of money, the exact amount of which defendant cannot at this time determine.

“Denies that the items of alleged cost set forth in paragraph VI of said alleged second amended complaint are the only items of cost that plaintiff would have incurred or been under in the performance of said contract; denies that any of the said items correctly sets forth or states the correct cost of the particular amount of said work it is intended to represent, and in this behalf defendant avers that said items are set forth as being correct for the purpose of this case only; denies that said sum of three thousand twenty-one and nine cents represents or is the value of any steel delivered to or accepted by defendant, or not paid for by defendant.

VIII.

“Denies that plaintiff has been injured or has suffered any damage by reason of the alleged breach of said alleged contract or any breach of any contract whatsoever; or has been injured or has suffered damage by reason of said alleged breach

of said alleged contract or of any breach of any contract in the sum of thirty-five thousand one hundred and sixty-four dollars and seventeen cents, or in the sum of thirty-thousand five hundred twenty-eight and seventeen cents, or in any sum whatsoever, either in the manner set forth in said second amended complaint or in any manner whatsoever, or at all.

"Denies that since said or any contract was breached by said defendant or anyone else as alleged in said second amended complaint, or otherwise, or before this suit was instituted, plaintiff demanded the payment or said or any damages; denies the said plaintiff has ever suffered said or any damage; denies that said defendant ever breached said or any contract.

"And for a further and separate answer and defense this defendant avers that the alleged cause of action is barred by the provisions of Subdivision one (1) of Section 339 of the Code of Civil Procedure of the State of California.

"And for a further, separate and second answer and defense, this defendant avers that the alleged cause of action is barred by the provisions of subdivision one (1) of Section 337 of the Code of Civil Procedure of the State of California.

"WHEREFORE, said defendant prays that plaintiff take nothing by its said action and that defendant have judgment for its costs herein incurred." (Record, pp. 62, 63, 64, 65, 66, 67, 68, 69.)

The above are the pleadings upon which this case was tried in September, 1912, before Honorable William C. Van Fleet, District Judge, and a jury, resulting

in a verdict in favor of plaintiff and against defendant, in the sum of \$17,372.00, (Record, p. 71) upon which judgment was rendered by the court.

The testimony of respondent consisted largely of depositions taken at Waukesha, Wisconsin, at which Mr. Humphrey, counsel for defendant, was present and cross-examined the witnesses.

THE FOLLOWING PROPOSITIONS OF FACT
WERE UNDENIABLY PROVEN AT THE
TRIAL:

I.

That at all the times mentioned in the second amended complaint, plaintiff was and still is a corporation organized under the laws of Wisconsin, and a citizen of Wisconsin, and the defendant was and still is a corporation organized under the laws of California, and a citizen of that State, with its principal office in San Francisco, California. (Record, p. 76.)

The defendant, as its name implies, was engaged in contracting for and the erection of buildings; that Thomas Vigus, who constantly figures in the testimony was at the time the contract was entered into, the general manager of the defendant and continued to be such until long after the contract was breached by defendant. (Deposition of Thomas Vigus, Rec., pp. 179-180.)

II.

That William F. Humphrey, chief counsel for defendant, was the Secretary of the defendant and certified to the resolution passed by the Board of Directors appointing Thomas Vigus its general manager. (Record, p. 180.)

III.

That the duties of Thomas Vigus as General Manager of defendant were to transact its general business, estimate cost of construction of buildings and enter into contracts for such construction and superintend the erection thereof. Approximately the amount of business done during the year Mr. Vigus acted as General Manager of the defendant, amounted to about one million dollars. (Record, p. 180.)

IV.

Plaintiff had a written contract with defendant, whereby the plaintiff agreed to furnish and deliver to defendant, f. o. b. cars at San Francisco, at the agreed price of \$77.00 per ton, all the structural steel necessary for the construction of the Columbia Theatre Building in San Francisco. This contract, at the caption bears date January 4, 1907, but was accepted and became effective January 17, 1907. It reads as follows:

“PROPOSAL FROM MODERN STEEL
STRUCTURAL CO.,

“Waukesha, Wis., Jan. 4, 1907.

“American-Pacific Construction Co., San Francisco, Calif.

“We propose to furnish you in good order the following described structural material, constructed in a workmanlike manner, described as follows and in accordance with the drawings furnished by Jos. D. Smedberg and specifications also furnished by J. D. Smedberg, identified with marks: ‘Copy #1,’

Initialed 'S. B. H. 12/30/06,' excepting as noted under 'REMARKS,' on sheet #2 attached.

"Namely, the structural steel and iron (except the grillage beams, bolts, separators and column bases mentioned on page 3 of specifications referred to above) for the Richelieu Realty Syndicate Theatre and Office Building, known as the Columbia Theatre; Location—southeast corner of Van Ness and Geary St., San Francisco, Calif.

"Delivery: as follows: That portion indicated by Mr. Smedberg, shown within red lines on blue prints 3-S, 4-S, 7-S dated by us on back of print as received Dec. 31, 1906, and 8-S dated by us on back of print as received Jan. 3, 1907, required to begin erection of steel work on stores to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg.

"Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved working, detail drawings, signed by Mr. Smedberg.

"REMARKS: Our proposition is based on the substitution in part (as referring to 'KIND, CHARACTER AND FINISH OF MATERIALS,' beginning page 9, and 'INSPECTION,' beginning page 11 of the above specifications) of Manufacturers' Standard Specifications as found in Carnegie's Hand Book.

"Mill Test Reports, within said specifications are proposed, as being satisfactory in the above respects to Mr. Smedberg, and upon his request stating upon which portions of the work he will require such reports, we will comply therewith by furnishing same.

"We also agree that the tonnage is to be deter-

mined and paid for by certificates from the Western Weighing Association at the point of shipment. It is understood that the AMERICAN PACIFIC CONSTRUCTION COMPANY, at their own expense, will weigh same at the Public Scales in San Francisco, and should they prove that the weights so certified by the Western Weighing Association at point of shipment are not correct, we hereby agree to reimburse the American-Pacific Construction Company, the amount overpaid us.

"Price to be seventy-seven (\$77.00) dollars per ton; freight allowed to San Francisco, California. Correct figured weights of steel to govern amount of sale and all steel work to be accepted at our works by Mr. Smedberg, or his authorized agent.

"Terms of payment as follows: 30 days net cash from date of invoices.

"Payable in New York, Chicago or Milwaukee Exchange, free of expense to us for the collection charges.

"We are responsible for shop errors in work not erected by ourselves and for alterations whether erected by ourselves or not, only when notified of same in writing before correction is made and given an opportunity and reasonable time to suggest remedy or to ourselves make alterations.

"When delays are caused to our men by material or labor not furnished by us, you agree to pay their time, at our regular rates, and their expenses, while so delayed.

"This contract is contingent upon our ability to procure material from the mills, delays of carriers and upon strikes, accidents or other delays unavoidable or beyond our reasonable control.

"It is expressly agreed that there are no promises, agreements or understandings outside of this contract and that no agent or salesman has any authority to obligate the MODERN STEEL STRUCTURAL COMPANY, by any terms, stipulations or conditions not herein expressed.

"The title and right of possession to all material we furnish remains with the MODERN STEEL COMPANY until the same has been fully paid for in cash.

"This proposition is for immediate acceptance, but although accepted does not constitute a contract until approved by an executive officer of the Modern Steel Structural Company, and is subject to change or withdrawal until so approved.

"In case any difference of opinion shall arise between the parties to this contract in relation to the contract, the work to be or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract, and these two shall have the power to name an uninterested umpire whose decision shall be binding on all parties to the contract.

"Ship via:

"MODERN STEEL STRUCTURAL CO.,

"Accepted January 17, 1907, by S. B. H.

"Approved by S. B. Harding, Pres.

"AMERICAN-PACIFIC CONSTRUCTION CO.,

"Thomas Vigus, Gen'l Mgr."

(Record, pp. 190-194, Rec. pp. 99-102.)

NOTE: Much of the testimony contained in the Record from pages 77 to 103, related to the execution of the contract, and as plaintiff had lost its duplicate of same, evidence of such loss, evidence of proper search to find same, and then evidence of the contents of such lost instrument. Not till late in the trial was plaintiff furnished by defendant with its duplicate of said contract which last, when produced and when put in evidence, made considerable evidence already adduced, immaterial.

V.

The defendant also furnished to plaintiff specifications for the structural steel for such building which were offered in evidence as plaintiff's Exhibit M. (Record, pp. 106 to 124.) These are headed: "SPECIFICATIONS. THE STRUCTURAL STEEL AND IRON OF AN EIGHT STORY OFFICE BUILDING THEATRE, to be erected on the southeast corner of Van Ness and Geary St., for the RICHELIEU REALTY SYNDICATE, San Francisco, California. FRANK T. SHEA, Architect, San Francisco, JOSEPH D. SMEDBERG, Consulting Engineer, San Francisco."

Also certain plans, as prepared by the architect, were delivered to the plaintiff by the defendant, and Smedberg, the consulting engineer, went to Waukesha, Wisconsin, where plaintiff's rolling mills were situated, to expedite the approval of the shop drawings, as prepared by the plaintiff for the structural steel of the building in question.

VI.

That immediately after the contract was executed the plaintiff proceeded with the work of preparing working drawings and ordering and fabricating steel. Such drawings consist of 31 sheets of tracing cloth, and were identified and offered in evidence at the trial. (Record, pp. 124-125.) There was also offered in evidence 28 sheets of detail drawings for the structural steel for the Columbia Theatre Building, prepared by plaintiff; and there were identified and put in evidence 69 sheets of onion skin paper containing a list of material, concerning these Mr. Harding testified:

"They relate to the detail drawings heretofore handed you, representing material required as for the respective sheets of drawings. They, in turn, serve as a requisition from which orders are placed with the rolling-mill for the steel."

"These exhibits of drawings and material list were all gotten out after the contract was executed. And we then ordered a large quantity of steel to be fabricated at \$38.00 a ton delivered at Waukesha. The rolling-mill paid the freight." (Record, p. 126.)

Mr. Harding, continuing his testimony, stated:

"Mr. Smedberg was the representative of the architect and he approved the details which have been offered in evidence. We fabricated and shipped to the defendant 39¼ tons of steel. That shipment was made the first of March, 1907, on car No. 45,373 of the Chicago & Northwestern and was consigned to the American-Pacific Construction

Co., at San Francisco, California. The total weight of the structural steel shipped was 78,470 pounds, or approximately $39\frac{1}{4}$ tons, and at \$77.00 per ton, its value would be \$3,021.09." (Record, p. 127.)

VII.

The plaintiff stood ready, able and willing to carry out its contract with the defendant. It had equipment for carrying out the contract and abundance of shop room. (Record, p. 128.) But on April 8, 1907, defendant breached the contract and notified plaintiff by telegram to stop all shipment and all work on the Columbia Theatre job until further notice. (Record, p. 132.) This telegram was followed by a letter dated April 9th, addressed to plaintiff, signed American-Pacific Construction Company, per Thomas Vigus, General Manager, confirming the telegram ordering all work to stop. (Record, p. 132.)

Defendant wired plaintiff thus:

"San Francisco, Cal., April 8th, 1907. Stop all shipments and all work in Columbia Theatre job until further notice. (Signed) American-Pacific Const. Co."

April 13, 1907, defendant wired plaintiff thus:

"San Francisco, Cal., Apr. 13, 1907. Wire us immediately outside figures settlement Columbia including steel in transit and everything."

April 13th, defendant wrote plaintiff thus:

"San Francisco, Cal., April 13, 1907.

"Modern Steel Structural Co.,

"Waukesha, Wisconsin.

"Gentlemen:— COLUMBIA THEATRE.

"We have to confirm our telegram of even date, as per confirmation herewith.

" 'Wire us immediately outside figure settlement Columbia including steel in transit and everything.'

"The Columbia Theatre people have decided not to finish the structural steel. They are getting up a lot of new stockholders to erect a different kind of building. It is rumored on the street (whether it is founded on facts or not, I do not know) that Messrs. Ruef and Schmitz, who are now indicted by the Grand Jury and are likely to go to jail within a very short time for a term of years (which the people of San Francisco have to congratulate themselves for) were indirectly connected with the Columbia Theatre.

"We expect to receive your wire to-morrow stating exactly how much expense you have been put to in this matter, including the cost of the two cars in transit. We will then take up the matter of a full settlement with you and get them off our hands. I have requested them to take up with Mr. Smedberg his position in the matter, and they have no doubt wired him what to do.

"Yours very truly,

"AMERICAN-PACIFIC CONSTRUCTION CO.,

"Per Thomas Vigus, Genl. Mgr."

(Record, pp. 135-136.)

April 16, 1907, plaintiff wired defendant thus:

"American-Pacific Const. Co., 536 Coke St., San Francisco, Calif., Cancellation price theater steel \$30,230.00, which represents our irretrievable loss if job not completed." (Record, p. 138.)

Thus it is manifest the contract was breached by defendant and plaintiff was not permitted to go forward and furnish the structural steel.

NOTE: Considerable correspondence ensued between plaintiff and defendant endeavoring to get at a basis of settlement for the 39¼ tons of steel delivered and the damages for breach of contract, but nothing resulted from this effort to compromise the matter, and afterwards suit was begun.

VIII.

The testimony tends to show that it would have required 1,500 tons of structural steel, to have erected the Columbia Theatre, with structural steel, as indicated by the specifications and plans for that building. (Deposition of S. B. Harding, Record, p. 130.)

Fred Hoffman was a structural engineer, thoroughly familiar with the plans and specifications for the building in question, and he testified that in his judgment it would have taken 1,500 tons of structural steel for the job. (Record, pp. 177-178.)

F. W. Harding, a practical estimator of the quantity of steel required for buildings, who was thoroughly familiar with the contract and specifications in the case

at bar, testified that it would have taken all told, in his judgment, approximately 1,500 tons of steel to have erected the building in question. (Record, pp. 182 and 226-227.)

And indeed, the estimate before the contract was executed, by the defendant's general manager, Mr. Vigus, and the architect and engineer, was to the effect that it would require at least 1,400 to 1,500 tons. (Record, p. 130.)

IX.

The deposition of Samuel B. Harding shows what it would have cost the plaintiff per ton for the steel from the rolling mills delivered at its plant at Waukesha, and also the cost to have fabricated the same, including paint and transportation to San Francisco.

In substance he testified that it would have cost for shop labor in fabricating the steel, \$4.80 a ton, and no more; that it would have cost for the total detailed drawings, for the 1,500 tons, \$1,350.00, of which all except \$682.50 had already been incurred when the contract was breached; that it would have cost for freight to San Francisco on the steel not shipped, \$15.00 per ton; that it would have cost for steel delivered by the rolling mill, f. o. b. cars Waukesha, \$38.00 per ton, or \$55,508.50 for the remaining 1,460 $\frac{3}{4}$ tons not furnished on the contract. (Record, pp. 152-153.) That it would have cost for paint for the tonnage not furnished, \$375.00; that it would have cost for fuel oil, \$72.00; for paint brushes, \$63.00; for punches, \$35.00;

in all \$695.00. (Record, p. 154.) Mr. Harding reaches the result that after deducting all elements of cost that it would have still incurred in order to have delivered f. o. b. cars San Francisco, the remaining 1,460 $\frac{3}{4}$ tons of structural steel, it would have left a profit in favor of plaintiff of over \$30,000.00. (Record, p. 156.)

During the taking of this deposition, Mr. Humphrey inquired of Mr. Taylor, counsel for plaintiff, the theory of plaintiff's case, thereupon Mr. Taylor responded.

"MR. TAYLOR: The theory contended for by the plaintiff is explicitly stated in the petition. It is that there was a contract for the structural steel to be furnished as mentioned in the petition; that the plaintiff was ready, able and willing to carry out that contract; that it proceeded to do so until it was prevented and hindered by the defendant; and therefore the plaintiff is entitled to recover the contract price of the total amount it was to have furnished, less what it would have cost the plaintiff to have completed the contract, including raw material, shop labor, journeymen labor, and freights." (Record, p. 157.)

Mr. F. W. Harding was present at the trial and testified before the jury as to what it would have cost plaintiff to have completed and delivered at San Francisco f. o. b. cars the remaining 1,460 $\frac{3}{4}$ tons of structural steel for the job in question.

A careful adding of these items aggregates \$85,775.00. Now, 1,500 tons of steel at \$77.00 a ton, the

contract price, would amount to \$115,500.00. The careful computation of Mr. F. W. Harding shows that there was evidence before the jury which would have justified them rendering a verdict in favor of plaintiff in the case at bar for \$29,725.00.

The defendant offered no evidence contradicting the execution of the contract nor its breach. It called four witnesses, to-wit, Mr. Breite, Record, pp. 233 to 240; Peter Zucco, Record, pp. 240 to 242; C. H. Snyder, Record, pp. 242 to 246; and John D. Galloway, Record, pp. 247 to 253. These witnesses testified as to the amount of structural steel indicated by certain plans, and also as to the cost of fabrication, which was in conflict with the testimony offered by plaintiff on these two topics.

Prior to the closing of the evidence in the case and before the argument to the jury was begun, defendant's counsel handed to the court 15 written instructions (Record, pp. 256 to 262), all of which instructions the court refused to give, and thereupon the court charged the jury as follows:

"THE COURT: Ordinarily, I would not submit the case to you at this hour, but we are rather short of jurors on the panel, and I may need your services in another case in the morning. It strikes me that this case is a very simple one not only in its facts, but in regard to the law, and I have an idea that you will be able to reach a verdict without difficulty and without remaining out over night, or any considerable period into the night. My

hesitation about submitting a case to the jury late in the day is that possibly they might get tied up and have to stay out all night. I know that is very unpleasant, but I do not apprehend any such result will follow in this case, so I will submit the case to you now. Give me your attention.

"This is an action brought by the plaintiff to recover from the defendant the damages alleged to have been suffered by it through the breach by defendant of a contract for the fabrication and delivery of structural steel. With the nature and terms of that contract you have been made familiar and I need not recite them. There is, under the evidence, substantially but one question left for your determination in reaching a verdict, and that is as to the amount of damages, if any, plaintiff has suffered through the breach of the contract sued on.

"Counsel for the defendant in his argument concedes that the plaintiff is entitled to some damages, but the amount is in controversy. While the making of the contract and its breach by the defendant are both denied in the answer, the evidence shows without any conflict whatsoever that the contract was duly executed between the parties as alleged. It is true that it does not appear that the specifications, or detail drawings for all the steel to be furnished under it had been completed by the architect, but it does appear without controversy that those specifications were so far completed as that both parties treated the contract as ready for execution, to the extent the specifications and drawings had been furnished, and that plaintiff, at the direction and request of defendant, had entered upon its execu-

tion, so that, for all purposes affecting the rights of the parties here involved, the contract is to be regarded as having been duly executed. As to the alleged breach of the contract by the defendant, the action of the defendant, as disclosed by the correspondence between the parties, and which is wholly uncontroverted, directing the stopping of all work under the contract and stating that the contemplated structure had been abandoned, justified plaintiff in treating the contract as at an end, and constituted in law a breach of the contract by defendant. You would not be justified, therefore, under the evidence, in finding against either the execution of the contract by the parties, or its breach by the defendant as counted upon.

"This leaves, as I have said, but one substantive question for your consideration, and that is the question of damages.

"The rule or measure of damages which may be recovered for the breach of a contract such as this is the difference between the consideration stipulated to be paid under the contract for its performance, and the cost of such performance. That is to say, under the contract in suit, the damages plaintiff will be entitled to at your hands, is the difference between the agreed price per ton for the quantity of structural steel which you may find from the evidence would have been required to complete the contemplated building in its entirety as provided in the contract, less what you may find it would have cost the plaintiff to have completed the fabrication and delivery of such entire quantity of steel; in other words, the plaintiff is entitled to

the agreed price per ton of the entire quantity of material covered by the contract to be furnished by it, less what it would have cost it to deliver it free on board the cars in San Francisco in a fabricated state, with interest and so forth. That interest I would suggest to you will be at the legal rate of seven per cent under the law of this State.

"The question of the amount of damages plaintiff has suffered, being in controversy, the burden is upon the plaintiff to establish the amount of such damages by satisfactory evidence; that is by evidence which produces moral certainty in your mind as unprejudiced persons, and when there is any conflict in the evidence it must preponderate in favor of the plaintiff, that is, the evidence should, in your judgment, be to some extent stronger in favor of plaintiff than that which is against it. Preponderance of evidence does not mean the greater number of witnesses, for you are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, as against a less number, or other evidence satisfying your minds. The direct evidence of one witness who is entitled to full faith and credit is sufficient to prove any fact in a case such as this.

"The evidence on behalf of plaintiff should be such as to enable the jury to determine with reasonable certainty, first, what the probable expense or cost would have been to the plaintiff to have performed the contract in its entirety, this to be determined from the different elements of cost involved in the work as disclosed in the testimony; and,

secondly, the probable gross quantity of steel, in tons, it would have required to complete the building. Thereupon, by taking the total cost to plaintiff of fabricating and delivering the material, and deducting it from the gross sum produced by multiplying the number of tons of steel you find it would have taken to complete the building by the price per ton fixed in the contract, that is, \$77, the difference or result will be the profit which plaintiff would have made on the contract, and which would represent the damages which, under the law, it would be entitled to recover.

"In figuring the cost to plaintiff of fabricating the steel in question, the fixed and regular monthly salaries paid by plaintiff to its permanent officers and heads of departments, without regard to this particular work, should not be taken into account unless you find that such item of general expense in plaintiff's business would have been increased by reason of plaintiff having to carry out the entire contract; but the jury should include in the items of cost such amount as they find would be a proper allowance for wear and tear on the machinery in plaintiff's plant had the entire work contemplated by the contract been done at such plant.

"The evidence should be such as to enable you to determine the different elements which I have referred to as entering into the question of damages, with reasonable certainty; mathematical certainty is not required, but such degree of certainty as will enable the jury to reach approximately just results.

"You will understand, as stated, that reasonable certainty in the respect mentioned is all that is re-

quired; plaintiff is not called upon to prove his case to a demonstration. The evidence is all before you, and it is for your consideration alone. It is the duty of the Court to state the law, and by that the jury are bound, but the facts are to be found by the jury as to all questions about which there is any conflict or controversy; and with that function it is not the province of the Court to interfere.

"You must be certain, however, that your verdict is based upon the evidence, and is not the result of arbitrary desire, on the one hand, or of surmise or speculation on the other.

"The Clerk has prepared forms of verdict for you, gentlemen of the jury, which you will make out in this case as indicated to you by my instructions. When you have reached a conclusion you will report to the Court. As it has been suggested, the plaintiff will be entitled to some verdict at your hands, so the other form of verdict which the clerk has drawn up will not be required, and all that it will be necessary for you gentlemen to do is to fill in the amount of damages which you may find in favor of the plaintiff. You will bear in mind that in the Federal Court the verdict of the jury must be unanimous, and cannot be by a less number as in the State courts. You may now retire, gentlemen of the jury."

After the Court gave the foregoing charge to the jury, and before the jury retired, the following colloquy took place between Mr. Humphrey and the Court:

"MR. HUMPHREY: All instructions given by the Court of its own motion, all instructions requested

by the defendant and refused, and all instructions given by the Court at the request of the plaintiff are deemed excepted to, are they not?

"THE COURT: We do not follow that practice here, but if you think that applies here, all right.

"MR. HUMPHREY: That will be the general exception that we take as given by the statute of the State. We except to all instructions given at the request of the plaintiff, all instructions given by the Court of its own motion, and all instructions requested by the defendant and refused or modified by the Court.

"THE COURT: You will have to take your chances on that. I don't know that that applies in this Court. (Then to the jury the Court said): You may retire, however, gentlemen. If that is the idea of counsel, all right.

"MR. HUMPHREY: That is the exception we desire to take."

(Record, pp. 267-268.)"

The Bill of Exceptions fails to show any proper exception saved as to the refusal of the instructions requested by counsel for defendant, or as to the giving of the charge by the Court to the jury. It is a fundamental rule that an exception under the Federal practice, cannot be saved in the manner pursued by defendant's counsel.

POINTS AND AUTHORITIES FOR RESPONDENT.

POINT I.

"The rule or measure of damages which may be recovered for the breach of a contract such as this, is the difference between the consideration stipulated to be paid under the contract for its performance, and the cost of such performance." (Record, p. 264.)

The trial court having announced this rule elaborated it thus:

"That is to say, under the contract in suit, the damages plaintiff will be entitled to at your hands, is the difference between the agreed price per ton for the quantity of structural steel which you may find from the evidence would have been required to complete the contemplated building in its entirety as provided in the contract, less what you may find it would have cost the plaintiff to have completed the fabrication and delivery of such entire quantity of steel; in other words, the plaintiff is entitled to the agreed price per ton of the entire quantity of material covered by the contract to be furnished by it, less what it would have cost it to deliver it free on board the cars in San Francisco in a fabricated state, with interest and so forth."

This was the charge of the trial court as to the measure of damages and such charge is correct. (Record, p. 264.)

Hinckley v. Pitts Messmore Steel Co., 121 U. S. 264;

Boiler & Tank Co. v. Machine Co., 55 Fed. l. c. 453; opinion by Dallas, C. J., and cases cited;

Horst v. Roehm, 84 Fed. Rep. l. c. 570;

Kingman & Co. v. Western Mfg. Co., 92 Fed. (Ct. of App. 8th Cir.) l. c. 489;

Hale v. Trout, 35 Cal. 229;

Winans v. Sierra, 66 Cal. 61;

Tahoe Ice Co. v. Union Ice Co., 109 Cal. l. c. 249;

Ahlers v. Smiley, 163 Cal. l. c. 205.

In this last California case, the Court said:

“The rule of damages in such cases is the difference between the cost of manufacture and the contract price. (*Hale v. Trout*, 35 Cal. 229; *Winans v. Sierra*, 66 Cal. 61.) Loss of profits which are the natural result of a contract and which the law implies from a breach may be recovered without allegations of special damage.”

Berthold v. Const. Co., 165 Mo. 304;

Hammond v. Beeson, 112 Mo. 198;

Crescent Mfg. Co. v. N. O. Nelson & Co.,
100 Mo. 325;

Lumber Co. v. Warner, 93 Mo. 374;

Little v. Mercer, 9 Mo. 218;

Brand v. Schuchmann, 60 Mo. App. l. c. 72;

Halpin v. Manny, 57 Mo. App. l. c. 61;

Madison v. Mayor of Brooklyn, 7 Hill, 72;
Baker & Co. v. Mfg. Co., 42 N. Y. Supp.
 76;
Fairfield v. Jeffries, 68 Ind. 578;
Silberstein v. Duluth Co., 68 Minn. 430;
U. S. v. Speed, 75 U. S. 77;
Eckenrode v. Chemical Co., 55 Md. 51;
Singleton v. Wilson, 85 Tenn. 344;
Railroad v. Shirley, 45 Tex. 356;
Fath Co. v. Tate, 105 Ky. 701;
Tufts v. Weinfeld, 88 Wisc. 647;
Muskegan Co. v. Keystone, 135 Pa. St. 132;
Williams v. Lumber Co., 118 N. Car. 928.

The contract was in writing and executed by the duly authorized agent of the defendant. Much correspondence recognizing its validity took place after it was signed and delivered. The breach of the contract was also in writing, consisting of several letters of defendant ordering plaintiff to cease work under the contract, because the erection of the building had been abandoned, and requested plaintiff to state the amount of its damages for the cancellation of the contract. Considerable correspondence ensued between the parties concerning the amount of plaintiff's damages.

Now as the execution of the contract was evidenced by writing, and its breach evidenced by writing, and not a scintilla of evidence offered by defendant contradicting such execution or breach, it was proper for the court to assume the existence of the contract obligatory upon the defendant, and its breach by the defendant.

"It is well settled that the trial court may withdraw a case from the jury altogether and direct a verdict for the plaintiff or defendant, as the one or the other may be proper, where the evidence is uncontradicted, or is of such a conclusive character that the court in the exercise of sound judicial discretion would be compelled to set aside a verdict in opposition to it."

Railroad Co. v. Converse, 139 U. S. 469,
l. c. 472;

Union Pac. Ry. Co. v. McDonald, 152 U.
S. 262;

McGuire v. Blount, 199 U. S. 142, l. c. 147,
held:

"It is strenuously urged that whatever the merits of the controversy there was sufficient proof to require a trial judge to submit the case to the jury, but no rule is better established in this court than that which permits a presiding judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different verdict. It is clear that where the court would be bound to set aside a verdict for want of testimony to support it, it may direct a finding in the first instance and not await the enforcement of its view by granting a new trial." Citing *Elliott v. Ry. Co.*, 150 U. S. 245; *Union Pac. Ry. v. McDonald*, 152 U. S. 262; *County Commissioners v. Beal*, 113 U. S. 227; *Railroad v. Converse*, 139 U. S. 469.

It would have been idle for the trial court to have

submitted to the jury, whether the contract pleaded was actually entered into between plaintiff and defendant, or as to whether the same was breached by the defendant. The evidence as to both propositions amounted to a demonstration, and there was no evidence offered by the defendant tending to contradict this demonstrative evidence introduced by plaintiff.

POINT II.

Other parts of the charge of the court to the jury are full, clear, accurate and tenable, leaving nothing unsaid which the court ought to have said, in order, properly to instruct the jury as to the law governing the case.

The charge as given by the court, in scope, precision and clearness is to be commended by this Court. (Record, pp. 262-267.)

No valid exception was saved by counsel for the defendant as to the charge given by the court. The following colloquy, however, occurred between Mr. Humphrey, counsel for defendant, and the court:

“MR. HUMPHREY: All instructions given by the court of its own motion, all instructions requested by the defendant and refused, and all instructions given by the court at the request of the plaintiff are deemed excepted to, are they not?

“THE COURT: We do not follow that practice here, but if you think that applies here, all right.

“MR. HUMPHREY: That will be the general exception that we take as given by the statute of the State. We except to all instructions given at the

request of the plaintiff, all instructions given by the court of its own motion, and all instructions requested by the defendant and refused or modified by the court.

“THE COURT: You will have to take your chances on that. I don’t know that that applies in this court. You may retire, however, gentlemen. If that is the idea of counsel, all right.

“MR. HUMPHREY: That is the exception we desire to take.” (Trans. of Record, pp. 267-268.)

Now, this colloquy amounted to no exception at all, which this Court will consider.

POINT III.

WHERE THE COURT INSTRUCTS THE JURY IN A MANNER SUFFICIENTLY CLEAR AND SOUND AS TO THE RULES APPLICABLE TO THE CASE, IT IS NOT ERROR TO REFUSE TO GIVE OTHER INSTRUCTIONS ASKED BY COUNSEL ON THE SAME SUBJECT, EVEN THOUGH THEY MAY CONTAIN CORRECT PROPOSITIONS OF LAW.

Humes v. U. S., 170 U. S. 210;

Railroad v. Cody, 166 U. S. 606;

Agnew v. U. S., 165 U. S. 36;

Rio Grande etc. Ry. Co. v. Leak, 163 U. S. 280;

Mining Co. v. Cheeseman, 116 U. S. 529;

Smith v. Fields, 105 U. S. 52;

Railroad Co. v. McCarthy, 96 U. S. 258;

Railroad Co. v. Horst, 93 U. S. 291;

Woodruff v. Hough, 91 U. S. 496;

Klein v. Russell, 19 Wallace 443.

THE REFUSAL TO GIVE A PROPER INSTRUCTION WHICH WOULD HAVE AVAILED THE PARTY NOTHING, THE JUSTICE OF THE CASE NOT BEING AFFECTED THEREBY, DOES NOT AFFORD SUFFICIENT GROUND FOR A REVERSAL OF A JUDGMENT.

Sullivan v. Mining Co., 143 U. S. 431;
Hartranft v. Langfield, 125 U. S. 128;
Railroad Co. v. Jurey, 111 U. S. 584;
Railroad v. O'Leary, 93 Fed. Rep. 737.

It is submitted that the court instructed the jury in a manner sufficiently clear and sound as to the rules of law applicable to the case. Therefore even if counsel for defendant had requested instructions sound as propositions of law, their refusal would not have been error.

POINT IV.

IF THE ENTIRE CHARGE IS EXCEPTED TO, OR A SERIES OF PROPOSITIONS CONTAINED IN IT ARE EXCEPTED TO IN GROSS, AND ANY PORTION OF WHAT IS EXCEPTED TO IS SOUND, THE EXCEPTION CANNOT BE SUSTAINED.

THE ATTENTION OF THE COURT MUST BE DISTINCTLY CALLED TO THE PORTIONS OF THE CHARGE EXCEPTED TO BEFORE THE FINAL SUBMISSION OF THE CAUSE TO THE JURY.

McDermott v. Severe, 202 U. S. 600;
Holloway v. Dunham, 170 U. S. 1. c. 619-620;
Thiede v. Utah Terr., 159 U. S. 510-522;
Newport News & Miss. Valley Co. v. Pace, 158 U. S. 36-40;

Railroad v. Mackey, 157 U. S. 72;

Iron Co. v. Blake, 144 U. S. l. c. 477-78;

Block v. Darling, 140 U. S. 234-239;

Ins. Co. v. Smith, 124 U. S. l. c. 424;

Life Ins. Co. v. Raddin, 120 U. S. 183-197;

U. S. v. Hough, 103 U. S. l. c. 72. In this case the opinion was written by Miller, J., who at page 72, said:

"Before this, however, the district attorney had asked of the court a charge consisting of four propositions which are set out and 'which instructions' says the bill 'the court refused to give, and the district attorney excepted.' According to the well settled rule of this court, if either of these four propositions was erroneous, or, in other words, if all the charge thus asked was not sound law, the court did right in refusing the prayer which presented them as a whole." Citing many authorities.

Partridge v. Boston & M. R. Co., 184 Fed. 211;

Coney Island Co. v. Dennan, 149 Fed. 687;

Montana Min. Co. v. St. L. Min. & Mil. Co., 147 Fed. Rep. l. c. 906. Decision by the 9th Cir. Ct. of App; opinion by Morrow, C. J.;

St. L. I. M. & S. Ry. Co. v. Spencer, 71 Fed. 93. Decision by Cir. Ct. of App., 8th Cir.

POINT V.

Prior to the closing of the evidence in the case and before the argument to the jury began, defendant re-

quested the court, in writing, to give the jury fifteen instructions. (Record, pp. 256-262.) The request was made in bulk, and not as to each instruction separately. The court refused to give said instructions, and thereupon the court proceeded to charge the jury as shown in the Transcript of Record, pages 262 to 267, and at the close of said charge counsel for defendant indulged in the colloquy with the court as hereinbefore stated.

Now, no exception other than as stated in this colloquy was taken with reference to the giving of the charge by the court, nor of its refusal to give the fifteen instructions requested by the defendant. It follows that there was no valid exception saved as to the charge given by the court to the jury nor its refusal to give defendant's fifteen instructions requested in bulk. See authorities under Point IV of this brief, and particularly the following cases:

Union Ins. Co. v. Smith, 124 U. S. 1. c. 424;

U. S. v. Hough, 103 U. S. 1. c. 72;

Worthington v. Mason, 101 U. S. 149;

Iron Co. v. Blake, 144 U. S. 1. c. 477-78;

Conn. Mut. Life Ins. Co. v. Union Tr. Co., 112 U. S. 250;

Burton v. Ferry Co., 114 U. S. 474;

Thiede v. Utah Terr., 149 U. S. 1. c. 520, held:

"The remaining assignments of error relate to the matter of instructions. It appears that at the close of the testimony the defendant presented a body of instructions in 22 paragraphs, and asked

the court to give them to the jury. They were marked 'Refused as a whole except as given,' and the only exception to such refusal was in this language: "the defendant excepts to the refusal of the court to give the instructions requested by the defendant, being numbered 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 21.' Such an exception is insufficient to compel an examination of each separate instruction. It is insufficient that any one of the series is erroneous. In *Beaver v. Taylor*, 93 U. S. 46-54, this precise question is presented, and the court said: 'The entire series of propositions were presented as one request; and if any one proposition was unsound an exception to a refusal to charge the series cannot be maintained.' (See, also, *Indianapolis & St. Louis R. R. Co. v. Horst*, 93, U. S. 291-295; *Block v. Darling*, 140 U. S. 234; *Bogk v. Gassert*, 149 U. S. 17, 26; *Holder v. U. S.* 150 U. S. 91; *Hickory v. U. S.*, 151 U. S. 303, 316; *Allis v. U. S.*, 155 U. S. 117; *Newport News etc. Valley Co. v. Pace*, 158 U. S. 36.)

The above cases are cited by the court in support of the paragraph quoted. Many other authorities might be cited to the same effect.

Bates on Federal Procedure, Vol. 2, pp. 804-805, reads:

"Every 'bill of exceptions ought to be upon some single point of law;' and every exception to the court's charge should be addressed to some separate, distinct and specific proposition of law contained in it; and if there be, in the opinion of counsel, more than one unsound proposition of law em-

braced in the court's instructions to the jury, he should make each one of them the subject of a specific, distinct and separate exception, and, if overruled by the trial court, he should take a separate bill of exceptions, complete in itself, to the court's ruling upon each exception. The court's charge most usually contains a series of independent, substantive propositions of law, or instructions to the jury, applicable to the different issues of fact involved in the case; and it is well settled that, it is the duty of a party or his counsel, excepting to such a charge or series of propositions or instructions, to except to them specifically, 'distinctly and severally,' and to call attention of the court to the specific propositions of law that are deemed erroneous, and where they are excepted to in mass the exception will be overruled, if any one of the propositions be correct. The language of the decisions and the rules of the appellate courts is to the effect that: exceptions to the charge must be specific and not general; and that the trial court is entitled to a distinct specification of the matters of law to which exception is made; and that the attention of the court should be 'specifically called at the time to any particular part of the charge that,' is 'deemed erroneous,' and that 'it is the duty of counsel excepting to propositions submitted to the jury to except to them distinctly and severally;' and that 'the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts.' The undoubted rule is, that each proposition of law deemed erroneous should be made the subject of a distinct and separate ex-

ception, and embodied in a separate bill of exceptions, sufficient in itself to present to the appellate court, upon writ of error, the 'single point of law.'"

COMMENT ON THE DEFENDANT'S INSTRUCTIONS REQUESTED.

INSTRUCTION 1 (Record, p. 280): Though the drawings were a material part of the contract and same were not as a whole completed, this would not make the contract void, because the drawings, yet uncompleted, would simply bear on the quantity of steel to be furnished and not upon its character, and both parties agreed to treat the contract as binding and plaintiff proceeded under it until the defendant breached it.

INSTRUCTION 2 (Record, p. 281), was properly refused by the court; first, there never was a third amended complaint filed in the case; second, because the undisputed evidence showed that plaintiff had delivered $39\frac{1}{4}$ tons of the structural steel at \$77.00 per ton, amounting to \$3022.75, for which the defendant had paid nothing. Now, under Instruction 2, unless plaintiff had established by a preponderance of the evidence every proposition contained in the first paragraph of the supposed third amended complaint, a thing which was never filed, the defendant could escape the payment for the actual tonnage of steel received and appropriated. Such cannot be the law.

INSTRUCTION 3 (Record, p. 282), was properly re-

fused because it was covered by the full and complete charge given by the court to the jury.

INSTRUCTION 4 (Record, p. 282), was properly refused because the charge given by the court to the jury covered the whole case. Not only so, but the statement contained in said instruction is vicious as a proposition of law. It would have told the jury that if they were unable to find from the evidence the cost of the minutest item of plaintiff's expense in the performance of the contract the verdict must be for the defendant. Such proposition is not the law.

INSTRUCTION 5 (Record, p. 283), is vicious in toto as a proposition. It manifests a misconception of the rule of damages for recovering in the case at bar. The charge given by the court states the proper theory on which the action was based and the theory applicable to a case of this type.

INSTRUCTION 6 (Record, p. 283), so far as applicable to the case at bar is covered by the charge given by the court.

INSTRUCTION 7 (Record, p. 284), is vicious as a proposition of law and was properly overruled by the court. Not only so, but the jury was fully instructed on all the issues by the court.

INSTRUCTION 8 (Record, p. 284), was fully covered by the charge given by the court so far as it embodies a correct statement of the law. It is quite difficult to understand why counsel should embody in his instruction

“said alleged contract,” when before the trial was concluded, counsel, as secretary of the American-Pacific Construction Company, produced the contract fully executed by both parties.

INSTRUCTION 9 (Record, p. 284), was properly refused because it asserts an erroneous theory of the case. It is not a question whether the plaintiff was free for other transaction and that had nothing to do with the quantity of damages plaintiff was entitled to recover. The court in its charge states the proper theory on which the action was brought as shown by the second amended complaint and that theory is the only sound theory on which the case at bar could have been tried.

INSTRUCTION 10 (Record, p. 285), states a theory of law foreign to the case at bar and had no application to the principles of law affecting the rights between the parties.

INSTRUCTION 11 (Record, p. 285), states abstract propositions of law, but the principles involved in Instruction 11 were given by the court in its charge to the jury.

INSTRUCTION 12 (Record, p. 286), will not stand the test of legal analysis. It might be that the jury were in doubt as to the total amount of damages suffered by the plaintiff and therefore not allowing plaintiff the full amount of damages claimed, but that instruction tells the jury that if any doubt at all exists in the mind as to the total amount of damages plaintiff sustained, then

the defendant would be entitled to appropriate to its own use the $39\frac{1}{4}$ tons of steel which it received and used and pay nothing therefor. Such a proposition is so manifestly unjust that it never could be law.

INSTRUCTION 13 (Record, p. 286), so far as embodies any correct legal propositions was covered by the charge by the court. The overwhelming and uncontradicted evidence in the case shows that plaintiff would have made a profit had it been permitted to perform the contract and there isn't a scintilla of evidence contradicting this proposition. To have placed Instruction 13 before the jury would have tended to confuse rather than enlighten the jury how to reach a just verdict.

INSTRUCTION 14 (Record, p. 287), would have cast doubt on the question in the mind of the jury whether there was or was not a contract. It would also have told the jury if they could not arrive at mathematical exactness as to the amount of damages plaintiff sustained, then the judgment should be for the defendant, and the defendant be permitted to appropriate to its own use without paying therefor the $39\frac{1}{4}$ tons of steel and escape all damages for the breach of the contract, notwithstanding the testimony convinced the jury that the plaintiff was damaged to the amount of \$17,372.00. Further, it sought to put before the jury the false theory, viz., that the damages claimed were speculative and remote.

INSTRUCTION 15 (Record, p. 288), was an attempt to enlighten the jury on what is meant by preponderance of the evidence. The court dealt with this matter, and said:

“The question of the amount of damages plaintiff has suffered being in controversy, the burden is upon the plaintiff to establish the amount of such damages, by satisfactory evidence; that is, by evidence which produces moral certainty in your minds as unprejudiced persons, and when there is any conflict in the evidence, it must preponderate in favor of the plaintiff, that is, the evidence should, in your judgment, be to some extent stronger in favor of plaintiff than that which is against it. Preponderance of evidence does not mean the greater number of witnesses, for you are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, as against a less number, or other evidence satisfying your minds,” etc.

Most, if not all, of the foregoing instructions are erroneous as propositions of law; and since they were offered in bulk, the court was justified in refusing to give them, and the record utterly fails to show any valid objections and exceptions touching the refusal to give said instructions.

REPLYING TO THE EXCEPTIONS SAVED
BY THE AMERICAN-PACIFIC CON-
STRUCTION COMPANY.

EXCEPTION 1 (Record, p. 76).

It was not reversible error for the court to permit Mr. Harding to answer the question, whether or not the Modern Steel Structural Company had a written contract with the American-Pacific Construction Company, with reference to furnishing the structural steel for the building known as the Columbia Theatre in San Francisco. When that question was propounded in the taking of his deposition it was objected to by Mr. Humphrey, as follows: "The question is objected to as leading and suggestive; not the best evidence and calling for a conclusion of the witness as to whether or not there is a written or any contract." Immediately after, the witness answered the question: "It did" He then proceeds to state that his company's copy of the contract executed by the defendant had been lost, but that he had a copy of the contract executed by the defendant and later in the testimony such copy was introduced in evidence.

It developed, however, very late in the trial, that during all of this time, the duplicate of the contract entered into between plaintiff and defendant was in the possession of the defendant's secretary Mr. Humphrey, counsel who was making these objections. On written notice served on the defendant to produce its copy of said con-

tract the same was produced late in the trial, and was offered in evidence, as will appear by the record (pp. 190-194).

Now, when this original contract was offered and read in evidence this is what Mr. Humphrey said:

"MR. HUMPHREY: Of course I do not yield that this is a contract. Otherwise we make no objection."

The duplicate copy was offered and read in evidence without objection and it remained for the trial court to construe its legal effect, and the trial court in its charge to the jury, at page 263, said:

"Counsel for the defendant in his argument concedes that the plaintiff is entitled to some damages, but the amount is in controversy. While the making of the contract and its breach by the defendant are both denied in the answer, the evidence shows without any conflict whatsoever that the contract was duly executed between the parties as alleged. It is true that it does not appear that the specifications, or detail drawings for all the steel to be furnished under it had been completed by the architect, but it does appear without controversy that those specifications were so far completed as that both parties treated the contract as ready for execution to the extent the specifications and drawings had been furnished, and that plaintiff, at the direction and request of defendant, had entered upon its execution, so that for all purposes affecting the rights of the parties here involved, the contract is to be regarded as having been duly executed."

If there was error in the first instance in permitting the witness to answer the question on page 76 of the record, it was not prejudicial error. It was a harmless error, and when the original contract produced by the defendant was put in evidence, it established that there was a contract which in the first instance plaintiff sought to prove in the only way open for it to prove the same, it having lost its duplicate copy.

EXCEPTION 2 (Record, p. 99).

The second exception relates to the overruling of an objection to the admission in evidence of a copy of the lost contract. As stated before, the plaintiff had lost its duplicate contract and had not at that time been furnished with defendant's duplicate. It therefore introduced as evidence a copy of the lost contract, and a number of letters tending to show that the contract had been executed by the defendant. It has been urged by the defendant that the court erred in admitting such copy of the contract in evidence, and that there was a fatal variance between it and the allegations of the second amended complaint. The second amended complaint averred that the deliveries of the steel were to have been made before September 1st. The copy of the contract admitted in evidence read:

"Balance of steel shipments to be sixty to ninety days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg."

This was not a material variance under the decisions of the Federal courts.

McDonnell v. State of Nebraska, 101 Fed. Rep.

l. c. 177;

United States v. LeBaron, 71 U. S. 642;

Pope v. Allis, 115 U. S. 363;

Moses v. United States, 166 U. S. 571, l. c. 579-580;

Grayson v. Lynch, 163 U. S. 468.

In this last case the court said:

“While cases may doubtless be found to the effect that descriptive allegations of this kind must be proved with great strictness, the tendency of modern authorities is to hold that no variance between pleadings and the proof offered to sustain it shall be deemed material, unless it be of a character to mislead the opposite party in maintaining his action or defense on the merits. (Citing authorities).”

And in the same case at pages 478-479, the court said:

“In *United States v. LeBaron*, 71 U. S. 4 Wall, 642-648, it is said that allegations of time, quantity, value, etc., need not be proved with precision, that a large departure from the same is allowed; that the same rule also applies to allegations of place.”

The alleged variance between the second amended complaint and the contract under the California Code and decisions was immaterial.

California Code of Civil Procedure, Chapter VIII, Section 469, reads:

"No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually mislead the adverse party, to his prejudice in maintaining his action or defense to the merits. Whenever it appears that a party has been so mislead, the court may order the pleading amended, according to such terms as may be just."

Section 470 reads:

"When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs."

Cobb v. Daggett, 142 Cal. 1. c. 144;

Lyles v. Perrin, 134 Cal. 417-18;

Holt v. Holt, 120 Cal. 67-69;

Santa Monica L. & M. Co. v. Hege, 119 Cal. 377-380;

Knox v. Higby, 76 Cal. 268.

The above cases hold that where there is a variance between the allegation and the proof, if it be such as not to mislead the defendant, such variance is immaterial and should be disregarded by the trial court.

It is our contention that there was no error on the part of the court, technical or otherwise, in admitting said copy of the contract at that stage of the proceeding, but if there was, it was non-prejudicial and affords no ground for reversing the judgment.

Not only so, but if it was an error at that time, it was waived when the original contract was offered in evidence, and counsel for defendant, Mr. Humphrey, stated: "Of course, I do not yield that this is a contract,

otherwise, we make no objection." (Record, p. 194.)

The rights of the parties could not be affected as to whether the agreed time of delivery was before September 1st or was sixty to ninety days after all the details had been approved. That question was not one upon which the rights of the parties hinged at all, and therefore it was immaterial.

EXCEPTION 3 (Record, p. 104)

Exception No. 3 relates to testimony bearing on the fact that the original contract had been executed by the defendant, and on January 15th, a duplicate copy so executed was sent by defendant to the plaintiff, and that the witness, Mr. S. B. Harding, thereupon put the number on the contract in his own handwriting, which number indicated the acceptance of the contract.

This question was then asked:

"Q. Does it indicate the acceptance of the contract?

"MR. HUMPHREY: I object to the question as leading, calling for the conclusion of the witness and irrelevant, incompetent and immaterial."

The objection was overruled and exception taken by the defendant, which exception defendant hereby designates as "Exception No. 3."

The witness answering further, says:

"It indicates that I, on receipt of that letter and enclosure gave the job a number, and contract as it were, through which it would be known in our

plant by number. That is the custom whenever we receive an accepted contract, to at once give it a number."

It is impossible to conceive how this explanation of Mr. Harding prejudiced the defendant's case. Not only so, but general objections in those sweeping words are not sufficient for the basis of the objection which if overruled will form grounds for reversal.

This testimony was put in as tending to show that the plaintiff had received from the defendant a duplicate copy of the executed contract, its copy having been lost, plaintiff went more into the particulars tending to show such a contract had actually been returned to the plaintiff. However, late in the trial, at plaintiff's request, defendant produced the duplicate copy of the original contract dated January, 1907, duly signed by plaintiff and defendant.

EXCEPTION NO. 4 (Record, p. 105.)

Mr. Harding having identified certain specifications for the structural steel and iron of the eight-story office building and theatre in question, consisting of nineteen pages and having stated that he recognized them as being the specifications that his company was to work by under the contract and having stated that these were the specifications furnished his company by the American-Pacific Construction Company, they were offered in evidence. Mr. Humphrey objected to their admission in evidence and his objection was overruled. Thereupon he saved Exception No. 4.

These specifications are copied in the record, pages 105 to 124. Observe the testimony showed that the specifications so offered in evidence were the ones furnished plaintiff by the American-Pacific Construction Company to work by, and the trial court said:

"We are only concerned here with what the witness testified to. The witness testified that those were the specifications they were to work by." (Record, p. 105.)

No reason is assigned why it was error to admit these specifications in evidence and it is inconceivable how it could be error to admit them. On every principle of law they were admissible.

EXCEPTION No. 5 (Record, p. 125).

Mr. S. B. Harding further testified:

"After we received the contract we proceeded with the work of preparing drawings and ordering and fabricating steel. These drawings are here today and they were prepared by us after the contract in question was executed. They consist of 31 sheets on tracing cloth." (Record, p. 124.)

Here counsel for plaintiff on the taking of the deposition, said:

"I will ask the Notary to mark these 'Plaintiff's Exhibit Detailed drawings A. B. etc., respectively. They are 31 sheets of details on tracing cloth offered as Exhibits A. B. etc., and then when the alphabet is exhausted, A-1, A-2, etc. There are 31 of these sheets and I now offer them in evidence.

MR. HUMPHREY: They are objected to as irrelevant, incompetent and immaterial, no contract having been established, and on the further ground that it does not appear that they are a part of the contract, or work undertaken by the plaintiff. (Record, pp. 124-125.)

The objection was overruled and exception taken, which exception was assigned as Exception No. 5.

The witness, continuing his testimony, says:

"These 31 sheets were drawn in reference to the Columbia Theatre Building for the American-Pacific Construction Company at the shop of plaintiff, and are part of the necessary work to be done to get out the tonnage.

Other testimony given in the case conclusively shows that it was not possible to get out this structural steel without first getting out these detailed drawings. (Record, p. 125.)

This evidence was admissible as showing the work already performed in carrying out this contract, and for the remaining part contracted for, but not then fabricated.

EXCEPTION No. 6 (Record, p. 128).

Exception 6 arose on an objection to the following question:

"Q. Now, Mr. Harding, I will ask you if at all times during the months of March, April, May and June, 1907, the plaintiff stood ready and willing to carry out the contract with the defendant?

"MR. HUMPHREY: We object to that as being leading and calling for the conclusion of the witness.

"A. It did."

The witness continuing, says:

"Plaintiff had equipment for carrying out the contract and abundance of shop-room. I am familiar with the size of the building, the plans for the building, specifications and plans of the building known as the Columbia Theatre Building. I am a technical man." (Record, pp. 128-129.)

Now, surely the question was a proper one.

EXCEPTION NO. 7 (Record, p. 131).

Exception 7 relates to the court refusing to strike out a certain answer given by S. B. Harding in his deposition. The motion which the court refused to sustain reads:

"MR. HUMPHREY: We ask all the answer except the word 'Yes' be stricken from the record on the ground that it is not responsive, and merely attempts to relate a conversation, general in its terms, that it is alleged took place either with the architect for the owner of the property, and not for the defendant or with Mr. Vigus. The conversation is not binding on us."

Now counsel for defendant is in error, when he says the part asked to be stricken out, or no part was with Mr. Vigus. The witness' answer thus asked to be stricken out reads:

“and my reasons for that statement would be this: the American-Pacific Construction Company, through Mr. Vigus talked of 1400 tons; the architect and his engineer, talked of 1400 or 1500 tons, as I remember it. Now, the architect’s plans I am speaking now of the original plans from which we made our detail drawings—were incomplete at the time we began work, and Mr. Smedberg came up for the purpose of completing these drawings, and in so far as we went in examining the original drawings prepared by the architect, we found a number of places where they were not up to the ordinances, and that was the occasion of our writing our letter of March 26, marked Exhibit ‘O,’ calling attention to the discrepancies, and I, therefore, from such investigations, and discrepancies found, think that the building would run up to the 1500 ton mark, if not more, as these increases spoken of are 20 per cent or 25 per cent. Of course, this would not apply to all the structure.” (Record, pp. 130-131.)

Obviously, if the defendant had carried out its contract and received from plaintiff all the structural steel the building required, then the actual number of tons would have been known. But as defendant breached the contract, the plaintiff had to prove in the best way it could the amount of tonnage it would have required if there had been no breach of the contract by the defendant.

Bearing on the quantity of structural steel that would have been required for the completion of the building,

had there been no breach of the contract, by the defendant, the attention of the court is called to the testimony of F. W. Harding, one of the officers of the Structural Steel Company, and a practical estimator of the quantity of steel required for a given structure. He testified:

"My name is F. W. Harding, I am 41 years of age. My residence is Waukesha, Wisconsin, and I am Vice-President of the Modern Steel Structural Company of Waukesha, which office I have held for the past three months. Prior to that time I was Treasurer of the Company for five or six years. I believe I was elected Treasurer in 1907, at which time I was also directing Manager and one of the Board of Directors.

"I am familiar with the contract that existed between the Modern Steel Structural Company and the American-Pacific Const. Co., and examined it critically and carefully the specifications and plans for the building in question known as the Columbia Theatre, and I can state very approximately that at least 1500 tons of steel would have been required to construct that building.

"I have done a great deal in behalf of my company in taking contracts, although it never became part of my duty to remember quantities, but I was required to place valuations on work. The estimating of quantities would be done by our clerical force. I am familiar with this contract, and I am able to state that after the contract was executed by the defendant what plaintiff did to carry it out," etc. (Rec., pp. 182-183.)

Frederick Hoffman, a witness whose deposition was taken at Waukesha, testified:

"My name is Frederick Hoffman. I am forty-one years of age, and am a structural engineer by occupation. I reside at 220 Broadway, Waukesha, Wisconsin. I have been a structural engineer for five or six years past. I was educated in a technical school in Germany, and am now employed by the Modern Steel Structural Company of Waukesha, Wisconsin, where I have been employed between nine and ten years past. When I was first employed by that company, I was shop inspector, and for the last five or six years I have been structural engineer, and my duties in that capacity consist of making general plans of structural steel structures; making detail plans; writing up specifications and perhaps, occasionally checking detail plans for the company. To a certain extent I am familiar with the plans and specifications for the Columbia Theatre job at San Francisco, which came into the shop of the plaintiff early in January, 1907. At that time I knew, from the plans and specifications, the length, width and height of the building, and generally in regard to its dimensions. I had nothing to do with the making of the detail drawings.

"Q. From your examination of the drawings and specifications of the building, in your judgment, what quantity of structural steel was required to carry out the plans and specifications for the Columbia Theatre building in question?

* * * * *

"A. In my judgment, it would take in the neighborhood of 1500 tons. That would be a fair

estimate; I arrived at approximately 1500 tons of structural steel by my past experience, considering buildings of similar construction and size, and considering the plans and specifications and the City Ordinances of San Francisco, covering such buildings at that time. I had before me the City Ordinances and specifications. I have no interest in this litigation." (Record, pp. 176, 177, 178.)

EXCEPTION NO. 8 (Record, p. 177).

Now, Exception No. 8 is based on the alleged error of the court in overruling defendant's objection to the following question propounded to Mr. Hoffman:

"Q. From your examination of the drawings and specifications of the building, in your judgment, what quantity of structural steel was required to carry out the plans and specifications for the Columbia Theatre Building in question?"

"MR. HUMPHREY: I object to that question, as it calls for opinion evidence."

"The objection was overruled and exception taken, which exception defendant hereby designates as its Exception No. 8.

"WITNESS answered: "In my judgment it would take in the neighborhood of 1500 tons." "That would be a fair estimate."

Insomuch as the defendant breached the contract there was no other way whereby it could be shown the number of tons of steel that it would have taken had not the contract been breached by defendant.

EXCEPTION NO. 9 (Record, p. 181).

This exception relates to the court sustaining objection to the following question :

“Q. With whom did you have that conversation?” (Meaning a conversation anti-dating the execution of the contract sued on.)

Surely the trial court committed no error, in sustaining such objection, since it was wholly irrelevant, incompetent and immaterial with whom he had a conversation. If the conversation had been gone into it might tend to vary or contradict the terms of the written contract which would not be proper. Where the written contract is finally executed by both parties, all previous colloquial is supposed to be merged in the contract.

EXCEPTION NO. 10 (Record, p. 233).

The tenth exception and assignment or error relates to the refusal of the court to sustain a demurrer to the evidence at the close of plaintiff's testimony. It would have been palpable error if the court had done so, because the evidence undeniably sustained every allegation of the second amended complaint. Moreover, if there had been merit in said demurrer defendant, by offering evidence after its demurrer was overruled, waived it.

Runkle v. Burnham, 153 U. S. 216;

Railroad Co. v. Snyder, 152 U. S. 684;

Railroad Co. v. Hawthorne, 144 U. S. 202;

Sigafuss v. Porter, 84 Fed. Rep. 430.

ASSIGNMENTS OF ERROR 11 TO 33.

Defendant's assignments of error from 11 to 33 inclusive related to instructions given and refused by the court, but as no proper exceptions were taken as to these at the trial, they should have no consideration by this Court. These instructions given and refused have been considered in this brief.

ASSIGNMENT OF ERROR 34.

Assignment of error 34 (Record, p. 294) should not be considered by this Court because it is not based on any proper exception saved at the trial.

ASSIGNMENT OF ERROR 35.

Assignment of error 35 should not be considered by this Court, because it is not based on any proper exception saved at the trial.

ASSIGNMENT OF ERROR 36.

Assignment of error 36 should be rejected because the court had a perfect right to permit the second amended complaint to be filed. Moreover, no exception was taken to the action of the court in permitting this to be done.

ASSIGNMENT OF ERROR 37.

The contentions of counsel for defendant that the court erred in overruling its demurrer to the second amended complaint is untenable for two reasons:

1st. Because the second amended complaint is formal, full, and explicit, and states a good cause of action in law.

2d. Because when defendant's demurrer was overruled, it saved no exceptions to the order of the court in overruling same, but filed its answer to the merits.

In Federal practice the doctrine is fundamental that filing a plea to the merits after a demurrer has been overruled operates as a waiver of the demurrer.

U. S. v. Boyd, 5 How. 29;

Campbell v. Wilcox, 10 Wall. 421;

Bell v. Mobile & Ohio R. R. Co., 4 Wall. 598;

Watkins v. U. S., 9 Wall. 759.

In the *Campbell* case, Justice Field, in writing the opinion of the court, said:

"The filing of a plea to the merits after the demurrer was overruled, operated as a waiver of the demurrer. The pleading was thus abandoned and ceased thenceforth to be a part of the record." In *Campbell v. City of Haverhill*, 155 U. S. 610.

Justice Brown, in writing the opinion of the court, at page 613, said:

"When a pleading is amended, the original pleading ceases to be a part of the record, because the party pleading having the power has elected to make the change; *Campbell v. Wilcox*, 77 U. S. 421, wherein this court held that the filing of a plea to the merits after a demurrer was overruled operated as a waiver of the demurrer." (Citing many Federal cases.)

Newcomb v. Imperial Life Ins. Co., 62 Fed. 97;
City of Plankinton v. Gray, 63 Fed. 415;
Gancert v. Henry, (Cal.) 33 Pac. 92;
San Diego County v. Siefert, (Cal.) 32 Pac.
 644;

Indeed, this doctrine is fundamental and well established in the Federal practice.

FINALLY.

It is a fundamental rule in the Federal courts that where the verdict is right on the merits the judgment will not be reversed on account of errors in the instructions.

Waldron v. Babbitt, 16 Wall. 577;
Tua v. Carriere, 117 U. S. 207;
Stewart v. Wyoming Cattle Ranch Co., 128 U.
 S. 383;
Railroad Co. v. Ross, 112 U. S. 377;
Bridge Co. v. McGrath, 134 U. S. 260;
West v. Camden, 135 U. S. 507;
Spalding v. Castro, 153 U. S. 39;
Hegler v. Faulkner, 153 U. S. 109;
McDermott v. Severe, 202 U. S. 600.

REPLY TO BRIEF OF PLAINTIFF IN ERROR.

The foregoing was prepared by Judge Taylor of the St. Louis bar, general counsel for the Modern Steel Structural Company, and necessarily in advance of the service of the brief of plaintiff in error. While it is felt that the statements of principle already made amply

cover the propositions discussed by opposing counsel, a few observations replying directly to some of the points discussed by counsel may perhaps lighten the labors of the Court in reaching its conclusion.

Appellant's counsel rely for reversal upon four propositions (Brief, p. 100) :

First. There was no valid contract;

Second. There was no damage proved;

Third. There was a fatal variance between the allegations of the complaint and the proofs:

Fourth. The action was premature, as the alleged contract, if a contract, provided within its own terms the means of settling the very point involved in this action.

I.

It is claimed the contract declared upon is invalid because the drawings and specifications referred to therein are not attached thereto, or, as is probably meant by counsel, they were not sufficiently identified in the proofs made, as being the drawings and specifications within the contemplation of the parties when the contract was executed.

So far as the specifications are concerned it would seem that they are sufficiently identified by the caption :

Specifications. The Structural Steel and Iron of an Eight Story Office Building Theatre to be erected on the Southeast corner of Van Ness Avenue & Geary St., for The Richelieu Realty Syndicate, San Francisco, Cal.

"Frank T. Shea, Architect, San Francisco.

"Joseph D. Smedberg, Consulting Engineer, San Francisco.

"San Francisco, December 21, 1906."

Especially is this so in view of the correspondence between the parties leading up to the execution of the contract, wherein it appears that two copies of the specifications had been forwarded by defendant to plaintiff (Record, p. 86), one of which copies was returned to defendant by plaintiff with its proposed contract of January 4, 1907, and referred to therein as being identified with marks "Copy No. 1" initialed "S. B. H. 12-30-06." It is true the copy retained by plaintiff did not bear these identification marks, yet had defendant at the trial furnished the Court its copy of these specifications when it produced the original contract it cannot be doubted that such copy would have exhibited the marks in question. Moreover, the copy of the specifications in evidence was proved to be a copy of the one furnished to defendant with the proposal of January 4th (Record, pp. 86, 104, 105).

There can be no question as to the identity of the drawings mentioned in the evidence as being the drawings referred to in the contract as furnished and to be furnished by J. D. Smedberg. There is not in the record the slightest intimation from counsel that the drawings constantly being referred to in the evidence were not those within the contemplation of the contract. Had the proofs failed in this respect the situa-

tion should have been met by a motion on defendant's part to strike from the record the contract and all evidence relating thereto. Had such a motion been made the plaintiff would have been permitted, if necessary, to introduce further evidence on the subject.

As we do not understand that counsel has taken the extreme position that a contract, such as the one under discussion, is void at its inception irrespective of what might be considered by them a sufficient identification of the drawings and specifications, we shall make no effort to reply to such a contention.

II.

To counsel's criticism that no damage was proved we may add.

The quantity and quality of the steel to be fabricated were sufficiently indicated in the specifications, and also in the drawings which had been prepared in advance of the execution of the contract, to form the basis of an estimation of damages occasioned by defendant's breach thereof. While it is not claimed that mathematical accuracy was possible in fixing the precise amount and character of the fabricated article, a reasonably accurate estimate thereof was practicable by "cubing" the structure whose dimensions were known.

"If we know the dimensions of a building we know from experience what that building will weigh, if we know the cubic foot rule." (Testimony F. W. Harding, Record, p. 225.)

"We do not need to see the size of the material to know what the weight of the structure would be." (Same witness, Record, pp. 227, 228.)

"Q. You would not be able to state what character of steel or truss or members would be required until the design was prepared by the architect, would you?

"A. Yes, you would by knowing what the city ordinances were. If you were designing a building to comply with those city ordinances you would know what they would be. In this case we would take our instructions from the engineer.

"Q. You would not know what the engineer intended to design for the theater?

"A. He would not get very far out of the way. The drawings have not all been prepared, but those that have been prepared are an indication of the whole, and they are my only information except the general drawings that I saw on one visit to San Francisco, in Mr. Shea's office. They gave me a general impression of the whole work.

"Q. But no designs as far as the theatre was concerned was ever prepared?

"A. No detailed drawings." (Same witness, Record, p. 255.))

Even defendant's witness Galloway (Record, p. 248) states that the method of obtaining the weight of a building by "cubing" is the general method. The witness qualifies the effect of this admission by stating that the method is not accurate. It is not contended that the method is scientifically exact, but simply that it is

reasonably approximate for the purpose of estimating damages in a case such as this.

The quantity and quality of the work to be performed under the contract in this case, must have been understood with reasonable definiteness by the parties thereto, as bids were called for on a pound basis (see Specifications, Record, p. 107, lines 19, 20) and accepted before all the drawings had been prepared. The circumstance that the American Pacific Construction Company had already entered into a contract with The Richelieu Realty Syndicate for the construction of the entire building, would seem sufficiently persuasive of the fact that a reasonable approximation of what was to be done thereunder was determinable from the plans in existence at the time the contract under review was awarded plaintiff. It would seem, therefore, that the "cubing method" of estimating weights in such a building was, by the owners and contractors in this line of business, deemed reasonably accurate and sufficiently practical, and further that the expense of fabrication averages up with such approximate uniformity, that the plans and specifications of the building then drawn furnished a reasonably accurate basis for a bid for the work to be done. This being so the evidence submitted to the jury as to the damage suffered by the plaintiff was certainly sufficiently definite to enable them to intelligently assess the amount thereof. This being especially so after defendant had abandoned its agreement and closed upon plaintiff the door to a more accurate

determination of the amount of work called for by the contract. The law will not permit a party thus to take shelter behind his own unlawful act. Defendant seeks here to escape by the plea that it is not possible to determine the exact amount of material to be fabricated, owing to the absence of the drawings, when his own unlawful act has taken from plaintiff the very means adopted for this purpose by the parties. As illustrative of this situation, see *Seymour v. Oelrichs*, 156 Cal. 782 l. c. 802, 803. This was an action by an employee under a contract for a term of years, seeking damages for an unlawful discharge.

“The rule is invariably applied in cases of personal injury, where the jury is permitted, in the assessment of damages, to consider evidence bearing not alone upon the immediate but upon the future effect of the injury upon the complaining party. Nor is the rule disturbed by the argument, advanced by the appellants, that it is impossible to determine with accuracy what damage plaintiff would actually suffer during the remainder of the unexpired term. It is to be conceded that the question of the extent of the future damage which a complaining party in a case like the one at bar would suffer is fraught with some difficulty. Yet it hardly rests with the defendants to complain of such difficulty, since it arises only through the wrongful act of the defendants themselves.”

The plans and detailed drawings of the office portion of the buildings were, without doubt, practically finished April 8, 1907, at the time plaintiff was ordered

to stop work under the contract. March 26, 1907, plaintiff writes to defendant:

"We shall send you framing plans in a very short time for the office portion of the building up to and including the seventh floor." (Record, p. 130.)

And on April 3rd also advises defendant:

"As to the plans we have everything agreed upon satisfactorily up to the eighth floor. . . . You, of course, understand that all of the above applies only to the part or office portion of the building." (Record, p. 226.)

Counsel lays stress upon plaintiff's apparent inconsistency in making diversified claims of damage, at different stages of the case. Such a situation arose from the statement of an erroneous theory of recovery in the earlier complaints filed in this action. This erroneous theory was abandoned in the Second Amended Complaint, which stated the true basis of recovery.

Counsel undertakes to demonstrate by a method asserted to be conclusive, that plaintiff could have made not only no profit in the execution of the contract in question, but would actually have lost money thereby. We are promised this accomplishment by reference solely to the testimony of the witnesses for defendants in error. A rather boastful promise, and one which seems to have been soon forgotten, as we find counsel under the apparent necessity of relying, in his demonstration, not only upon the testimony of Briete, Snyder and Zucco, defendant's witnesses, but also of ignoring certain important features of the evidence of plaintiff's

witnesses, which latter evidence alone was to accomplish plaintiff's undoing.

Referring now to the statement found on pages 93, 94 and 95 of appellant's brief, and adopting, for the moment, the basis upon which the estimates therein are made, i. e., the quantity of the steel for fabrication as 1200 tons, and counsel's estimate of the shop cost and drawing cost of the work up to the time of defendant's order to stop work under the contract, we have the following criticisms to offer:

As to the drawing cost:

At the time work was stopped \$669.28 had been paid out for this item of expense. While the material sheets produced (prepared for the purpose of ordering material) covered only 256 tons of steel, the detailed drawings must have had reference to a much larger tonnage, as the plans for the office portion of the building, for a period of several days prior to the stoppage of the work, had, as we have just seen, been pretty well framed up, and owing to the fact that in an office building the structural work of each floor is practically the same, most of the detail drawings which were gotten out for the first floor would serve equally well for the others above, with the possible exception of the eighth floor. It is safe to say that the expense of the drawing work for the office portion of the building had practically all been taken care of. This statement is in effect borne out by the testimony of S. B. Harding (Record, p. 223), stating that in his judgment the number of detailed

drawings of the building would be from 75 to 80. This estimate was given February 12, 1907, when the witness's judgment was uncolored by financial interest and given under circumstances which would naturally have tended rather to exaggerate the number of drawings than to lessen it. It will be remembered that the number prepared was 31. If the estimate of counsel is to prevail, it would have taken 310 detailed drawings to have furnished the structural steel of the building.

The statement that 50 per cent in weight of the building belongs to the theatre portion is a serious error.

(See testimony F. W. Harding, Record, pp. 253, 254.)

"Q. Mr. Harding, what part of the drawings for a theatre building proper, the average theatre building, presents intricacies in drawings?

"A. This building is a theatre and office building. The open space that is indicated on those plans is not filled with a lot of work. The only way that that work can be averaged with the whole is to consider what part of the theater work is difficult work. The office portion and store portion is plain work. The difficult part of the work that some stress has been laid on is a very small proportion of the whole work. To answer the question directly, I would say from forty to fifty per cent of the building, according to this open space, would be occupied by the theatre. That would be just a comprehensive view; it might be thirty per cent, or it might be 50 per cent. The tonnage that would be apportioned to the bulk of the building, as I stated

yesterday, I believe would not exceed twenty per cent of the whole work in the building. To make myself clear on that, theatres are not all alike. It depends upon what duplication there is. In this particular case, there is considerable duplication. I should say, that for the portion of the theatre work, five dollars a ton is not out of the way for the cost of drawings for that part of the whole structure.

“Q. What tonnage would it take for that?”

“A. Well, I should say twenty per cent of the whole tonnage of the building would be that class of work.”

So that on the basis of a 1200-ton building we would have the structural steel weight distributed as follows: to the office portion 960 tons and to the other portion 240 tons.

Counsel's claim for generous treatment in his analysis, in that he is only charging \$4.10 per ton for the detailed drawings of the theatre portion, when F. W. Harding had stated it might be \$5.00, becomes more apparent than real, when we find him adding per ton in this statement \$4.10 to \$6.00 and over, which had already therein been charged in the figures \$6,692.80 as the total drawing cost; making nearly \$10.00 per ton for the theatre drawing details, a figure largely in excess of that named by defendant's most enthusiastic witness.

Assuming as correct the basis taken by counsel for his statement, it should be amended as follows:

Shop Cost:

Office part, 960 tons at \$8.00	\$ 7,680.00
Theatre part, 240 tons at \$12.00	2,680.00

Drawing Cost:

Office part, approximately	669.28
Theatre part, 240 tons at \$5.00	1,100.00
Freight	18,000.00
Steel cost	45,600.00
	<hr/>
	\$75,729.28
1200 tons of steel at \$77.00	\$92,400.00
Total cost as above	75,729.28
	<hr/>
Profit	\$16,670.72
Interest 7% from April 8, 1907, to September 18, 1912, date of judgment, 5½ years, 38½ per cent	6,317.50
	<hr/>
Amount damage	\$22,988.22
On basis of 1500 tons steel add 25%	5,747.00
	<hr/>
	\$28,735.22

From which the following deductions
should be made (Record, pp. 154,
155):

Paint	\$375.00
Coal	162.00
Fuel oil	72.00
Paint brushes	50.00
Punches	35.00
Depreciation	160.00
	<hr/>
	854.00

Leaving still as damages estimated

on general basis adopted by *Defendant*

~~for~~ for a 1500-ton building

\$27,881.22

III.

VARIANCE.

This has been fully covered in former part of the brief.

IV.

Action as being prematurely brought:

The case of *Holmes v. Richet*, 56 Cal. 312, cited by counsel, seems to us to conclusively negative counsel's contention on this point.

In conclusion we wish to say that much of the brief on behalf of plaintiff in error, it seems to us, has been devoted to a discussion of the effect of the evidence, practically as to whether it is sufficient to justify the verdict in this case. While we have appreciated that, upon the record, such a discussion was not in order, we have trespassed somewhat along the same lines in following our opponent's lead, in order that a false coloring should not be given to the case on its merits. The only approach to the right to discuss the evidence, which counsel may have had under his assignments of error, can be found in his exceptions to the denial of defendant's motion for non-suit. Even here such a discussion is precluded by the necessity for the denial of the motion, as plaintiff was concededly entitled to a judgment for the amount of steel fabricated and delivered to defendant under the contract.

Respectfully submitted,

SENECA N. TAYLOR,

WRIGHT & WRIGHT & STETSON,

Attorneys for Defendant in Error.

No. 2272

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

AMERICAN-PACIFIC CONSTRUCTION COMPANY
(a corporation),

Plaintiff in Error,

VS.

MODERN STEEL STRUCTURAL COMPANY
(a corporation),

Defendant in Error.

REVISED ORIGINAL AND SUPPLEMENTAL BRIEF FOR
PLAINTIFF IN ERROR.

WILLIAM F. HUMPHREY,
Attorney for Plaintiff in Error.

LENT & HUMPHREY,
Of Counsel.

Filed this.....*day of December, 1913.*

FRANK D. MONCKTON, Clerk.

By.....*Deputy Clerk.*

FILED

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REVISED ORIGINAL AND SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

Introductory.

Within the time specified by the rules of this court, plaintiff in error served and filed its original brief. During counsel's preparation for the oral argument several glaring substantive errors in orthography, composition and references to the "Transcript of Record" were discovered, and therefore to save the court unnecessary labor and to present clearly the position of the plaintiff in error

its request for permission to prepare and file a revised and supplemental brief was granted.

The original brief need not be read as this revised and supplemental brief, for the convenience of all, will include all the matters contained in the original brief as well as such additional points and authorities as, in the judgment of counsel, sustain the contention of plaintiff in error; and it will also contain a discussion of the points urged in the brief of the defendant in error. Therefore this brief will contain in the following order

1. *Statement of the case.*
2. *Assignment of Errors.*
3. *Argument.*
4. *Discussion of Position of Defendant in Error.*

I.

Statement of the Case.

This is an action at law for damages for an alleged breach of contract. The defendant in error had judgment in the lower court for \$17,372.

The facts of the case may be summarized as follows:

Shortly after the San Francisco disaster of April 18, 1906, the "Richelieu Realty Syndicate", a California corporation, leased the premises in the City and County of San Francisco known as

the southeast corner of Geary Street and Van Ness Avenue for the purpose of erecting thereon an eight-story *combined office building and theatre* (Tr. p. 106). The American Pacific Construction Company (plaintiff in error) a California corporation, was organized in the latter part of the year 1906 for the general purpose of erecting buildings, but not for *the fabrication of, or the erection of*, the steel members of a building. The Modern Steel Structural Company (defendant in error) is and for many years prior to the year 1906 was, and ever since has been, a Wisconsin corporation, with its plant at Waukesha, Wisconsin, organized for the special purpose of manufacturing, fabricating and erecting steel structures of all kinds (Tr. pp. 75-76). S. B. Harding, president of the Modern Steel Structural Company (defendant in error) was in San Francisco when "The Richelieu Realty Syndicate" was seeking bids for the structural steel and iron work required for its proposed building. He was then counselling the American Pacific Construction Company to open a structural steel shop at San Francisco and promised to aid it in establishing such shop by interesting himself in it and sending men to operate the plant (Tr. p. 80; p. 92). While thus advising with it he suggested that the American Pacific Construction Company, plaintiff in error, bid for the steel work for the proposed Richelieu Realty Syndicate Building and, if successful, sublet the work to the defendant in error,

the Modern Steel Structural Company. It was argued that the bid of the plaintiff in error, a local concern, would receive more favorable consideration than that of the defendant in error. Mr. Harding, president of the defendant in error, knowing that the plaintiff in error was unfamiliar with the steel business supervised the entire affair and offered to, and did, plan the contract which plaintiff in error proposed to the Richelieu Realty Syndicate (Tr. p. 84; p. 85, bottom page 86 and p. 87; p. 90; p. 91; p. 96). The proposition as planned by Mr. S. B. Harding was submitted to "The Richelieu Realty Syndicate" and accepted (Tr. p. 84). The first acceptance was verbally given on or about the 22nd day of December, 1906 (Tr. p. 82). Pursuant to the understanding that the work was to be sublet to it, the Modern Steel Structural Company sent to the plaintiff in error early in January, 1907, for its acceptance a proposal in the following words:

"PROPOSAL FROM MODERN STEEL STRUCTURAL Co.
Waukesha, Wis., Jan. 4, 1907.

American Pacific Construction Co.,
San Francisco, Cal.

We propose to furnish you in good order the following described structural material, constructed in a workmanlike manner, described as follows and in accordance with the *drawings furnished by Jos. D. Smedberg* AND *specifications also furnished by J. D. Smedberg*, identified with marks: 'Copy #1' Initialed, 'S. B. H. 12-30-06', excepting as noted under 'remarks' on sheet #2 attached.

Namely, the structural steel and iron (except the grillage beams, bolts, separators and column bases mentioned on page 3, of specifications referred to above) for the Richelieu Realty Syndicate Theatre and Office Building, known as the Columbia Theatre; Location—Southeast corner of Van Ness & Geary St., San Francisco, Cali.

Delivery: as follows: *That portion indicated by Mr. Smedberg, shown within red lines on blue prints 3-S, 4-S, 7-S, dated by us on back of print as received Dec. 31, 1906, and 8-S dated by us on back of print as received Jan. 3, 1907, required to begin erection of steel work on stores to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg.*

Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg.

REMARKS: Our proposition is based on the substitution in part (as referring to '*kind, character and finish of materials*' beginning page 9 and '*inspection*' beginning page 11 of the above specifications) of Manufacturers' Standard Specifications as found in Carnegie's Hand Book.

Mill Test Reports, within said specifications are proposed, as being satisfactory in the above respects to Mr. Smedberg, and upon his request stating upon which portions of the work he will require such reports, we will comply therewith by furnishing same.

We also agree that the tonnage is to be determined and paid for by certificates from the Western Weighing Association at the point of shipment. It is understood that the AMERICAN PACIFIC CONSTRUCTION COMPANY, at their own expense, will weigh same at the Public Scales

in San Francisco, and should they prove that the weights so certified by the Western Weighing Association at point of shipment are not correct, we hereby agree to reimburse the AMERICAN PACIFIC CONSTRUCTION COMPANY, the amount overpaid us.

Price to be Seventy-seven dollars (\$77.00) per ton; Freight allowed to San Francisco, Cali. Correct figured weights of steel to govern amount of sale and all steel work to be accepted at our works by Mr. Smedberg, or his authorized agent.

Terms of payment as follows: 30 days net cash from date of invoices.

Payable in New York, Chicago or Milwaukee Exchange, free of expense to us for the collection charges.

We are responsible for shop errors in work not erected by ourselves and for alterations, whether erected by ourselves or not, only when notified of same in writing before correction is made and given an opportunity and reasonable time to suggest remedy or to ourselves make alterations.

When delays are caused to our men by material or labor not furnished by us, you agree to pay their time, at our regular rates and their expenses, while so delayed.

This contract is contingent upon our ability to procure material from the mills, delays of carriers and upon strikes, accidents or other delays unavoidable or beyond our reasonable control.

It is expressly agreed that there are no promises, agreements or understandings outside of this contract and that no agent or salesman has any authority to obligate the MODERN STEEL STRUCTURAL COMPANY by any terms, stipulations or conditions not herein expressed.

The title and right of possession to all material we furnish remains with the MODERN

STEEL COMPANY until the same has been fully paid for in Cash.

This proposition is for immediate acceptance, but although accepted does not constitute a contract until approved by an executive officer of the Modern Steel Structural Company, and is subject to change or withdrawal until so approved.

In case any differences of opinion shall arise between the parties to this contract in relation to the contract, the work to be or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract and these two shall have the power to name an uninterested umpire whose decision shall be binding on all parties to the contract.

Ship via:

MODERN STEEL STRUCTURAL Co.,

Accepted Jany. 17th, 1907, by S. B. H.

Approved by S. B. Harding, Pres.

AMERICAN PACIFIC CONSTRUCTION Co.,

Thomas Vigus, General Manager."

The pertinent portions of the "specifications" referred to are as follows (Tr. pp. 106, 107, 108, 109, 110, 111):

"San Francisco, December 21, 1906.

"In order to understand the business relations involved in the following specifications, some explanation of them is necessary.

"Mr. Joseph D. Smedberg, the consulting engineer, is under contract with Mr. Frank T. Shea, architect, to furnish those parts of the plans and specifications for the building which relate to the iron and steel frame and reinforced concrete work.

"He is also under contract with the Richelieu Realty Syndicate to supervise the inspection,

to superintend the erection of the steel frame work, to check all bills rendered by the contractors for this portion of the work, and, in general to see that all the contracts relating to this part of the building are faithfully fulfilled. * * *

“GENERAL:

“The steel construction described in these specifications is that *for a new office building and theatre*, Southeast corner of Van Ness Avenue and Geary Street, San Francisco, Cal. The building is in plan 149' x 120' 0", and is eight stories high above the sidewalk, with basement extending 20' 3" below ground. (Datum).

“The plan of construction is as follows:

“THE GENERAL PLANS FOR THE THEATRE PORTION OF THE BUILDING BEING INCOMPLETE STILL, THE INTENTION IS TO ERECT THE OFFICE BUILDING PORTION FIRST, AND ESPECIALLY RUSH WORK ON THE FIRST SECTION COLUMNS, FIRST AND SECOND STORY BEAMS AND SIDEWALK BEAMS. OPEN HOLES IN COLUMNS, BEAMS AND GIRDERS FOR CONNECTING THEATRE CANTILEVERS, etc., *will be drilled in the field*, AS ARRANGEMENT OF THEATRE FRAMING CANNOT BE DETERMINED ACCURATELY AT PRESENT, and this method will not delay any portion of the office building construction, due to lack of information regarding connection.

“The contract for grillage, beams and cast-iron pedestals will be made separately in order to have foundations ready for first delivery of steel work, and cause no delay in the erection of frame.

“SPECIFICATIONS EXPLAINED:

“*These specifications are supplemental to the contract already entered into for the constructional iron and steel work of this building between The American Pacific Construction Company, parties of the first part, and Riche-*

lieu Realty Syndicate, parties of the second part. They are the specifications referred to in the said contract, and which are to be considered a part of that contract.

“The specifications intended to cover all the structural iron work for frame and reinforced concrete in said building. They are intended to co-operate with the drawings for the same, both those furnished by the architect, and those furnished by the engineer, as hereinafter specified, and what is called for by either is as binding as if called for by both. They are intended to describe and provide for a finished piece of work. * * *

“When necessary, or desirable, he [the contractor] must apply to the architect, or the engineer, for further details or specifications during construction or before proceeding with his work.

* * * * *

“REFERENCE IN CASE OF DISPUTE:

“Should any difference of opinion or dispute arise in relation to the meaning of these specifications, or of the said drawings, furnished by either the architect or the engineer, as hereinafter specified, reference must be made to the engineer Joseph D. Smedberg, whose decisions on all such points shall be final and conclusive.

“DRAWINGS:

“The general dimensions, arrangements and sections required for the structural iron work herein specified are shown on the general structural iron drawings prepared and furnished by the engineer. * * *

“Detail or shop drawings required by the contractor, including drawings of every part and piece of the work, with all the lists, schedules, indexes, erection plans or other directions necessary for the proper manufacture,

finish and erection of the work covered by these specifications and the said general drawings will be made and furnished by the engineer. * * *

“ORDERS:

“All materials required to be furnished or work to be done under these specifications or by the said general structural iron drawings will be ordered by the engineer from time to time with the shop drawings, lists, schedules, etc., for the same as fast as they can be prepared, *and the contractor for the structural iron work must order no material and perform no work under these specifications until he has received the said detail drawings, lists and schedules for the same.* * * *”

In connection with the foregoing quotations, we desire to call attention particularly to the fact that neither proposal nor specifications described the character or quantity of the structural material the furnishing of which was in contemplation. That matter was left for determination *by means of drawings thereafter to be prepared by the engineer, representing, not The American Pacific Construction Company, the plaintiff in error, but the Richelieu Realty Syndicate.* It further appears from said quotations that the matter of definite provision for the work of putting up the steel frame for this large, eight-story building was in a very incomplete state, subject to various contingencies, and big with possibilities of the uncertainty and delay which afterwards developed in the attempt to get a “starting point” (Tr. pp. 224; 227) for the contemplated

contract work. As shown by letters written by the plaintiff and by the testimony of S. B. Harding, hereinafter referred to, these difficulties were fully appreciated at all times by the defendant in error and its officers.

The acceptance of said proposal by the American Pacific Construction Company on the 15th day of January, 1907 (Tr. p. 102), constitutes the *alleged contract* for the *alleged breach* of which the jury declared that the defendant in error was damaged in the sum of seventeen thousand three hundred and seventy-two dollars (\$17,372).

The drawings referred to in the said proposal *were never completed*. There were *no drawings whatever* for the theatre portion of the proposed building. *None was ever made* (Tr. pp. 108, 165, 255). Without completed drawings there was no means, except by "guessing" by which the jury or any one could ascertain the number of tons of steel required for the proposed building, and therefore nothing upon which to base a judgment for damages (Tr. pp. 248, 241, 235, 225).

On the first of March, 1907, defendant in error shipped from Waukesha, Wisconsin, to plaintiff in error thirty-nine and one quarter ($39\frac{1}{4}$) tons of fabricated steel of the value of \$3021.09. This is the only steel fabricated or shipped by defendant in error under the said alleged contract, or at all (Tr. p. 231).

On April 8, 1907, for the first time it became apparent to the plaintiff in error that the Richelieu Realty Syndicate was a financial wreck and unable to carry out its contract and plaintiff in error immediately telegraphed defendant in error to stop all work, and later advised defendant in error that the Richelieu Realty Syndicate was hopelessly insolvent and had abandoned its contract with the American Pacific Construction Company (Tr. p. 20, p. 132, p. 133, p. 137). When it was apparent beyond any question that the Richelieu Realty Syndicate was unable to carry out, and had abandoned, the contract, plaintiff in error, on the 13th day of April, 1907, telegraphed defendant in error (Modern Steel Structural Company) to wire its outside figure for the settlement of its claims under the alleged contract it had with the plaintiff in error. In doing this the American Pacific Construction Company was not only proceeding along the lines of fairness but was true to the business friendship which it thought had been established between it and the defendant in error and out of which arose the alleged contract in question (Tr. p. 135). No reply was received to this wire and on the 15th day of April, 1907, the plaintiff in error wrote for this figure and asked defendant in error in fixing its loss to remember that plaintiff in error would sustain a heavy loss on its main contract in addition to any sum paid to defendant in error (Tr. p. 137). In reply defendant in error asked \$30,230 in satisfaction of alleged damages caused by the cancellation of

the contract, only one thirty-seventh of which, according to its own story, had been performed, and on the full performance of which only \$115,500 was to be paid (Tr. p. 138, p. 46). In other words, it claimed damages in the sum of \$30,230 for the non-fulfillment of a contract, which, if fulfilled required the payment only of \$115,500. Pursuant to requests from plaintiff in error different itemized statements of these damages were furnished but no two of them agree.

By its letter of May 28, 1907, the items of the alleged damages are specified as follows:

Material as per accompanying 4 sheets— weight—275,481 lbs. at \$1.90 unloaded in our yard	\$ 5234.14
Car of steel invoiced	3021.09
<i>Expenses and money advanced J. D. Smedberg</i>	350.00
Shop Drawings	1441.53
UNUSED SHOP SPACE LYING IDLE	20,183.24
Total	<hr/> \$30,230.00

(Tr. p. 149).

J. D. Smedberg was *the representative of the Richelieu Realty Syndicate and of its architect* (Tr. pp. 104, 127, 223). Yet money loaned to him was charged against plaintiff in error as part of the cost of doing the work under the alleged contract.

By its letter of the 15th of October, 1907, defendant in error wrote that the above figures were made

up “somewhat hurriedly” [request for them was made April 22, 1907 (Tr. p. 140) and they were furnished by letter dated May 28, 1907,—thirty-six days later—(Tr. p. 149),] and, therefore the figures given under date of May 28, 1907, were more or less approximate. But by October 15, 1907, it had ample time to consider its damages and to detail the items and thus detailed they made the total sum of \$30,931.23 (Tr. p. 211). This was its second appraisalment of its damage (Tr. p. 211). In this appraisalment it added to the actual cost of the raw material and the cost of fabrication various percentages of such costs and this added sum is called “overhead expenses” and is included as part of the cost of performing the contract (Tr. pp. 211, 216, especially 214).

In its first complaint its third appraisalment fixes its damages at \$30,881.23 (Tr. p. 10) while by its fourth appraisalment contained in its amended complaint the total damage is fixed at \$35,164.17 (Tr. p. ⁴⁷147).

Mr. S. B. Harding, *president of the defendant in error*, makes the fifth appraisalment of the alleged damage and fixes it at \$34,470 (Tr. p. ¹⁵⁷165). And although the “overhead expenses” of the defendant in error apportionable to this contract (Tr. p. 164) amounting to \$7171.23 monthly (Tr. p. 164) which were included as part of the cost of the performance of the contract in the second appraisalment, are omitted by Mr. S. B. Harding in his appraise-

ment the total damages pivot about the mystical sum of \$30,000.

F. W. Harding, vice-president of the defendant in error, offers the sixth appraisement of the damage sustained by the defendant in error by breach of the alleged contract and fixes it at \$29,637.00 (Tr. bottom page 186). He did not include in his estimate of the cost of performing the alleged contract the share of the "*overhead expenses*" chargeable to this contract (Tr. p. 187).

The president of the defendant in error (Tr. p. 156) and its vice-president (Tr. p. 186) testified to the amount of the alleged damage, and its secretary gave his appraisement in writing (Tr. pp. 211-216). There was absolutely no agreement among them on the cost of performing the contract, or in any particular except in the amount of damage. Each guessed an amount in the neighborhood of \$30,000 as the profit the defendant in error would have made if the contract had been performed, notwithstanding that on January 25, 1907, the defendant in error did not consider the contract profitable for, through its president, it wrote to the plaintiff in error:

"If you desire to buy the job elsewhere and not give the \$77.00, we would be very much pleased to relieve you, only asking you to pay us what we have already done" (Tr. p. 189); and

again on the 31st day of January, 1907, its president in effect said that THERE WAS NO PROFIT in the

alleged contract with the plaintiff in error, writing as follows:

“We felt in the whole transaction that we were more *carrying out the obligations made by G. W. Harding, of Los Angeles, than anything else, as we were so filled up with work and the writer further said that we would be pleased if we could sublet it to someone and get out EVEN and at the same time serve you*, but if we could not, we were going to stick by and fill the order” (Tr. p. 196).

In the beginning the defendant in error was convinced that the alleged contract could not be performed by it except at a loss. This conviction possessed its president even after the contract was signed and as late as January 31st, 1907 (Tr. p. 196). But when the American Pacific Construction Company on the 7th day of April, 1907, notified defendant in error that the bankrupt condition of the Richelieu Realty Syndicate made the performance of the contract impossible, then the opinion of all its officials changed radically. The American Pacific Construction Company's (plaintiff in error) “unfamiliarity” (Tr. pp. 86, 87) and “inexperience” (Tr. p. 85) with steel work, its confidence in the *defendant in error*, invited and reposed pursuant to the injunction written by defendant in error to plaintiff in error on the 21st day of December, 1906, in the following language:

“You will have to put yourself in our hands to do the right thing by you * * *” (Tr. p. 91).

the bankruptcy of the Richelieu Realty Syndicate, its consequent inability to carry out its contract with the plaintiff in error, and therefore the impossibility of the latter performing its alleged contract with the defendant in error presented to defendant in error an opportunity for it to coin these misfortunes into a profit of thirty thousand dollars.

Generally in cases of this character it is almost impossible for the defendant to dispute the claim of plaintiff that the cost of performance would be less than the contract price. The claimant of damages declares how much less than any other person he can manufacture an article or carry out contract. Fortunately for the plaintiff in error the legal principles applicable to the case at bar destroy the very foundation of the claim for damages by declaring the alleged contract void. But if this were not so the many points raised by the assignments of error demand the reversal of the judgment.

The questions raised on this writ of error relate to the following propositions:

1. The proposal of the defendant in error and its alleged acceptance by the plaintiff in error did not constitute a valid, or any, contract.

- (a) It was incomplete because, although it contemplated furnishing all the structural steel required for a building to be constructed in accordance with drawings and specifications to be furnished by Joseph D. Smedberg, such drawings were

never made and the specifications were never completed and therefore there was no means of knowing or determining the character and quantity of steel to be furnished.

(b) Neither drawings nor specifications were ever attached to, nor made part of, said proposal and neither the drawings nor the specifications were ever completed. The partially completed specifications referred to drawings for the description of character and quantity of material, but such drawings were never completed. Therefore, it was impossible for either party to know the quantity of steel to be fabricated; the manner in which it was to be fabricated, or the size, form, weight, or appearance of the various steel members entering into said building, or the cost of fabricating the same. The said alleged contract is uncertain and indefinite inasmuch as it does not show, nor in any manner indicate the amount of steel to be fabricated, or the size (long, short, broad or narrow) weight (light or heavy), form, appearance or style into which the various steel members of the proposed building were to be fabricated.

Therefore, the defendant in error never could fabricate the steel required for the building—the drawings and design for which were never furnished; until they were finished even the architect of the proposed building could not describe any of its members, even though, in his mind he might

have had formed some conception of its exterior design. No architect, engineer or other person could estimate the quantity without the drawings, as without them there could be no basis for such estimate.

2. There was no proof of damage. Even if the alleged proposal and acceptance had constituted a valid contract, there is absolutely no evidence of damage, except in the sum of \$3021.09, the amount spent in part performance of the contract, all other damages being the result of pure speculation and conjecture. The proposal was too indefinite to establish a sufficient predicate for fixing any damages.

3. There was a variance between the contract alleged and the one sought to be proved, in the following particulars:

(a) It was alleged that the contract was for an agreed amount of steel, to wit: 1500 tons. The testimony shows simply a proposal to furnish the structural steel required for the Columbia Theatre Building to be shown by the drawings and specifications to be furnished by Joseph D. Smedberg and no such drawings were ever prepared or furnished.

(b) The contract alleged provided delivery of all fabricated steel at San Francisco, on or before September 1, 1907, at \$77.00 per ton, f. o. b. San Francisco; while the testimony only tended to sustain an alleged contract for steel at \$77.00 per

ton, freight allowed to San Francisco and deliveries to be made as follows:

“That portion indicated by Mr. Smedberg shown within red lines on blue prints 3-S, 4-S, 7-S, dated by us on back of print as received Dec. 31, 1906, and 8-S, dated by us on back of print as received, Jan. 3, 1907, required to begin the erection of steel work on stores to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg.

Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg.”

4. The action is premature. If the contract is valid, then any difference concerning it or the work done under it was by its terms to be settled by arbitration. The defendant in error has never arbitrated or offered to arbitrate the dispute involved in this action. This clause was inserted by the defendant in error and is a condition precedent to its right of action.

Question one (1) above is raised on exceptions:

(a) To the ruling of the court admitting in evidence the proposal of defendant in error, dated January 4, 1907, and being plaintiff's Exhibit “K” and plaintiff's Exhibit No. 3 (Tr. p. 99).

(b) To the ruling of the court in allowing witness, Samuel B. Harding's answer, over objection by plaintiff in error, the following question: “Does

it indicate the acceptance of the contract" (Tr. p. 104).

(c) To the ruling of the court admitting in evidence over the objections of plaintiff in error certain alleged incomplete specifications, made by Frank T. Shea and Joseph D. Smedberg and marked Exhibit "M" (Tr. p. 105).

(d) To the ruling of the court in admitting in evidence over the objections of the plaintiff in error certain 31 sheets of detail drawings (Tr. p. 125).

(e) To the ruling of the court allowing the witness Samuel B. Harding, over the objections of plaintiff in error, to answer the question "Now, Mr. Harding, I will ask you if at all times during the months of March, April, May and June, 1907, the plaintiff stood ready and willing to carry out the contract with the defendant?" (Tr. p. 128).

(f) To the ruling of the court refusing to grant the motion of counsel for plaintiff in error to strike out the following answer of witness Samuel B. Harding "And my reasons for that statement would be this: The American Pacific Construction Company, through Mr. Vigus, talked of 1400 tons; the architect and his engineer talked of 14 or 1500 tons as I remember. Now the architect's plans—I am speaking now of the original plans from which we made our detail drawings—*were incomplete at the time we began work*, and Mr. Smedberg came up for the purpose of completing these drawings and

insofar as we went in examining the original drawings prepared by the architect we found a number of places where they were not up to the ordinances, and that was the occasion of our writing our letter of March 26, marked Exhibit 'O' calling attention to the discrepancies and I, therefore, from such investigations and discrepancies found, think that the building would run up the 1500 ton mark, if not more, and these increases spoken of are 20 per cent or 25 per cent. Of course this would not apply to all the structure" (Tr. pp.130-131).

(g) To the ruling of the court in allowing witness Frederick Hoffman, over the objection of counsel for defendant (plaintiff in error) to answer the following question: "From your examination of the drawings and specifications of the building in your judgment, what quantity of structural steel was required to carry out the plans and specifications for the Columbia Theatre Building in question?" (Tr. p. 177).

(h) To the ruling of the court denying the motion for non-suit made by counsel for defendant (plaintiff in error) (Tr. pp. 231-232).

(i) To the refusal of the court to instruct as a matter of law that as the drawings which were a material part of the contract were never completed the contract was void and the verdict must be for the defendant (Tr. p. 280).

(j) To the refusal of the court to instruct the jury that unless the plaintiff established by a preponderance of evidence the following elements, to wit: the existence of a contract, containing plans and specifications; the character of the work to be done, the price, the quantity to be delivered and time of delivery and that the cost to plaintiff in carrying out such a contract was less than the contract price, the verdict must be for the defendant (Tr. p. 281).

(k) To the refusal of the court to instruct as a matter of law, as follows:

The direct evidence of one witness who is entitled to full credit is sufficient for proving any fact in this case. The evidence upon which your verdict should be based must be satisfactory evidence and that evidence only is satisfactory which produces moral certainty in an unprejudiced mind. You are not to guess at whether or not there was a contract, if any, nor guess at the amount of damages plaintiff sustained, ~~if~~ any, nor should you enter into the realm of speculation, for the burden of proving such facts is upon the plaintiff. If you are unable to find from the evidence that there was a contract, or if you find there was a contract, but you are unable to find from the evidence the amount of damages plaintiff sustained, if any, your verdict must be for the defendant. If the evidence upon any of these questions is equally balanced your verdict must also be for the defendant.

If, after a careful consideration of all the evidence you are not able to conclude from the facts which are established that there was a contract or if you conclude that there was a contract but that the damages claimed are too speculative or remote, your verdict should be for the defendant, because in none of these instances has the plaintiff established by a preponderance of evidence the facts which are essential to a verdict in its favor (Tr. p. 287).

(1) To the refusal of the court to instruct as a matter of law, as follows:

The law in this case, and indeed in every case, is that a party coming into a court of justice must satisfy the jury by what is called a preponderance of evidence as to the justice of his claim; what we mean by a preponderance of evidence is this: we cannot get a pair of scales, and by some arbitrary method put on one side the testimony of plaintiff and on the other side the testimony of defendant and say which outweighs the other, or whether it is evenly balanced but you are to try to do that mentally as far as possible.

The law says that unless the plaintiff satisfies you throughout the entire case of the correctness of his story to such an extent that it outweighs the proof of the defendant's he cannot recover. In other words, if the testimony is evenly balanced, it shows that there is some doubt in your mind; that it is not sufficient; that is, if the testimony of the plaintiff

weighs just the same as that of the defendant, you must find for the defendant, that is the law. The plaintiff can only recover when his testimony outweighs that of the defendant (Tr. p. 288).

(m) To the instruction of the court to the effect that there was under the evidence but one question left for the jury to determine in reaching a verdict and that is the amount of damages plaintiff suffered through the breach of contract sued on (Tr. pp. 288-289).

(n) To the instruction of the court given as follows:

Counsel for the defendant in his argument concedes that the plaintiff is entitled to some damages, but the amount is in controversy. While the making of the contract and its breach by the defendant are both denied in the answer the evidence shows without any conflict whatsoever, that the contract was duly executed between the parties as alleged. It is true that it does not appear that the specifications or detail drawings for all the steel to be furnished under it had been completed by the architect, but it does appear without controversy that those specifications were so far completed as that both parties treated the contract as ready for execution to the extent the specifications and drawings had been furnished and that plaintiff at the direction and request of defendant had entered upon its execution so that, for all purposes affecting the rights of the parties herein involved, the contract

is to be regarded as having been duly executed, as to the alleged breach of the contract by the defendant, the action of the defendant as disclosed by the correspondence between the parties and which is wholly uncontroverted, directing the stopping of all work under the contract and stating that the contemplated structure had been abandoned, justified plaintiff in treating the contract as at an end and constituted in law a breach of the contract by defendant. You would not be justified, therefore, under the evidence in finding against either the execution of the contract by the parties or its breach by the defendant as counted upon (Tr. pp. 289-290).

Question 2 above is raised on exceptions

(a) Same as are specified as being raised by question 1.

(b) To the ruling of the court sustaining the objection of counsel for plaintiff (defendant in error) to question asked Thomas Vigus, to wit: "With whom did you have that conversation?" (Tr. p. 181).

(c) To the ruling of the court denying the motion for nonsuit made by counsel for defendant (plaintiff in error) (Tr. pp. 231-232).

(d) To the refusal of the court to instruct as a matter of law, as follows:

In its third amended complaint on file plaintiff alleges: that on the 19th day of January, 1907, a

contract was made with the defendant whereby plaintiff agreed to deliver f. o. b. cars San Francisco, California, at \$77 per ton the quantity of structural steel and iron required by plans and specifications for the Columbia Theatre Building, recited in said alleged contract, which quantity plaintiff estimates at approximately 1500 tons, and plaintiff says that by the terms of the contract plaintiff agreed to deliver all such material to the defendant before September first, 1907.

I instruct you that unless plaintiff has established to your satisfaction by a preponderance of evidence the existence of a contract containing all those substantial terms, to wit: the plans and specifications, the character of the work to be done, the price, the quantity to be delivered and the time of delivery, and in addition to that, established by the same preponderance of evidence that plaintiff's cost in carrying out the contract was less than the contract price, your verdict must be for the defendant (Tr. p. 281).

(e) To the ruling of the court in refusing to instruct as a matter of law, as follows:

It is the duty of the plaintiff to establish by a preponderance of the evidence the complete cost to plaintiff of the performance of this contract. Unless it has done so, there is no evidence upon which you may base any verdict as to the amount of damage sustained by plaintiff (Tr. p. 282).

(f) To the ruling of the court in refusing to instruct as a matter of law, as follows:

You are not to guess at the amount of such costs nor to enter into the realm of speculation, for the burden of proving such costs is upon plaintiff and if you are unable to find from the evidence the cost of performing the alleged contract and every item of plaintiff's expenses in such performance, or if you are unable to conclude from the facts which are established to your satisfaction by a preponderance of the evidence what would have been the cost to plaintiff in the performance of said alleged contract, then your verdict should be for the defendant, because the plaintiff, in that event has not established by a preponderance of the evidence, the facts which are essential to a verdict in its favor (Tr. p. 282).

(g) To the ruling of the court in refusing to instruct as a matter of law, as follows:

In a case of this kind, there are two distinct items as the ground of damages: *First*. What has already been expended towards performance, less the value of the materials on hand purchased for this particular work. *Second*. The profits that plaintiff would have realized by the performance of the whole contract.

The second item, profits, cannot always be recovered. They may be too remote and speculative in their character and therefore incapable of that

clear and direct proof which the law requires (Tr. p. 283).

(h) To the ruling of the court in refusing to instruct as a matter of law, as follows:

If it is possible for you to satisfy yourself by a preponderance of the evidence of the cost to plaintiff of the performance of this contract, then before you may render a verdict as to the amount of damages it sustained, if any, you must determine from a preponderance of the evidence what deduction should be made from the contract price for the time saved by plaintiff in the performance of the contract, its release, from care, trouble, risk and responsibility attending a full execution of the contract; unless you are able to determine from the evidence what amount plaintiff saved in the circumstances your verdict must be for the defendant (Tr. p. 283).

(i) To the ruling of the court in refusing to instruct as a matter of law, as follows:

If there is omitted from the evidence elements of expense which plaintiff would have incurred had the contract been performed, or elements showing the amount plaintiff saved by not devoting all the time that would have been required in the performance of the contract and released from the risk of performance then your verdict should be for the defendant (Tr. p. 284).

(j) To the ruling of the court in refusing to instruct as a matter of law, as follows:

In determining plaintiff's costs in performing said alleged contract allowance must be made for every item of cost and expense attending a full compliance with any performance of said alleged contract, and in estimating any profits which plaintiff claims it would have made in performing said contract you must, of course, exclude all such as are merely speculative and conjectural (Tr. p. 284).

(k) To the ruling of the court in refusing to instruct as a matter of law, as follows:

If you find that a contract has been established with all its essential terms, then when plaintiff ceased to perform the contract, its expense ceased; its plant became free to be used in other ventures and was no longer employed in this, and if it is impossible to ascertain from the evidence what plaintiff saved on the general cost of completing the alleged contract by not being required to perform it, then the evidence is insufficient and too speculative for you to base any just and legal verdict thereon, as to the possible profits plaintiff would have earned or damages it would have sustained (Tr. pp. 284-285).

(l) To the ruling of the court in refusing to instruct as a matter of law, as follows:

If you should find by a preponderance of the evidence that there was a contract between the plaintiff and the defendant it was nevertheless

the duty of the plaintiff not to allow its plant to remain idle, but to use every reasonable effort to procure other work and if it did not procure other work to take the place of the work mentioned in said contract, during the time it would be employed in the performance of this contract you should deduct the amount of profits made by the plaintiff on such other work from any sum you may find it is entitled to under the facts of this case (Tr. p. 285).

(m) To the ruling of the court in refusing to instruct as a matter of law, as follows:

The burden of proof in this case is upon the plaintiff. It does not devolve upon the defendant to show that the plaintiff was not damaged by the alleged breach of contract or if so damaged the amount of those damages, but it devolves upon the plaintiff in order to prevail to establish by a preponderance of the evidence that the alleged breach of contract in fact damaged plaintiff and the amount of such damages (Tr. pp. 285-286).

(n) To the ruling of the court in refusing to instruct as a matter of law, as follows:

If the evidence leaves you in doubt as to whether or not plaintiff was damaged by the breach of contract, or as to the amount of the damages, your verdict must be for the defendant (Tr. p. 286).

(o) To the ruling of the court in refusing to instruct as a matter of law, as follows:

In no instance are you to conjecture or surmise that plaintiff would have profited by the performance of the contract. If no facts are disclosed to you by a preponderance of the evidence which establish that the plaintiff would have profited by the performance of the contract and the amount of such profits, your verdict must be for the defendant (Tr. p. 286).

(p) To the ruling of the court in refusing to instruct as a matter of law, as follows:

The direct evidence of one witness who is entitled to full credit is sufficient for proving any fact in this case. The evidence upon which your verdict should be based must be satisfactory evidence and that evidence only is satisfactory which produces moral certainty in an unprejudiced mind.

You are not to guess at whether or not there was a contract, if any, nor guess at the amount of damages plaintiff sustained, if any, nor should you enter into the realm of speculation for the burden of proving such facts is upon the plaintiff. If you are unable to find from the evidence that there was a contract, or if you find there was a contract, but you are unable to find from the evidence the amount of damages plaintiff sustained, if any, your verdict must be for the defendant. If the evidence upon any of these questions is equally balanced your verdict must also be for the defendant.

If, after a careful consideration of all the evidence you are not able to conclude from the facts

which are established that there was a contract, or if you conclude that there was a contract, but that the damages claimed are too speculative or remote, your verdict should be for the defendant, because in none of these instances has the plaintiff established by a preponderance of evidence the facts which are essential to a verdict in its favor (Tr. p. 287).

(q) To the ruling of the court in refusing to instruct as a matter of law, as follows:

The law in this case, and indeed in every case, is that a party coming into a court of justice must satisfy the jury by what is called a preponderance of evidence as to the justice of his claim; what we mean by a preponderance of evidence is this: We cannot get a pair of scales, and by some arbitrary method put on one side the testimony of plaintiff and on the other side the testimony of defendant and say which outweighs the other, or whether it is evenly balanced, but you are to try to do that mentally as far as possible.

The law says that unless the plaintiff satisfies you throughout the entire case of the correctness of his story to such an extent that it outweighs the proof of the defendant's, he cannot recover. In other words, if the testimony is evenly balanced it shows that there is some doubt in your mind; that it is not sufficient; that is, if the testimony of the plaintiff weighs just the same as that of the defendant you must find for the defendant; that is the law. The plaintiff can only recover where

his testimony outweighs that of the defendant (Tr. p. 288).

(r) To the instruction of the court given as follows:

This is an action brought by the plaintiff to recover from the defendant the damages alleged to have been suffered by it through the breach by defendant of a contract for the fabrication of structural steel. With the nature and terms of that contract you have been familiar and I need not recite them. There is, under the evidence, substantially but one question left for your determination in reaching a verdict and that is as to the amount of damages, if any, plaintiff has suffered through the breach of the contract sued on (Tr. pp. 288-289).

(s) To the instruction of the court given as follows:

Counsel for the defendant in his argument concedes that the plaintiff is entitled to some damages, but the amount is in controversy. While the making of the contract and its breach by defendant are both denied in the answer, the evidence shows without any conflict whatsoever that the contract was duly executed between the parties as alleged. It is true that it does not appear that the specifications or detail drawings for all the steel to be furnished under it had been completed by the architect, but it does appear without controversy that those specifications were so far com-

pleted as that both parties treated the contract as ready for execution to the extent that the specifications and drawings had been furnished and that plaintiff, at the direction and request of defendant, had entered upon its execution so that for all purposes affecting the rights of the parties herein involved the contract is to be regarded as having been duly executed. As to the alleged breach of the contract by the defendant, the action of the defendant, as disclosed by the correspondence between the parties and which is wholly uncontroverted directing the stopping of all work under the contract and stating that the contemplated structure had been abandoned, justified plaintiff in treating the contract as at an end, and constituted in law a breach of the contract by defendant. You would not be justified, therefore, under the evidence in finding against either the execution of the contract by the parties or its breach by the defendant as counted upon (Tr. pp. 289-290).

(t) To the instruction of the court given as follows:

The rule or measure of damages which may be recovered for the breach of a contract such as this, is the difference between the consideration stipulated to be paid under the contract for its performance and the cost of such performance. That is to say under the contract in suit, the damages plaintiff will be entitled to at your hands, is the difference between the agreed price per ton for the quantity of structural steel which you may

find from the evidence would have been required to complete the contemplated building in its entirety as provided in the contract, less what you may find it would have cost the plaintiff to have completed the fabrication and delivery of such entire quantity of steel; and, in other words, the plaintiff is entitled to the agreed price per ton of the entire quantity of material covered by the contract to be furnished by it, less what it would have cost to deliver it free on board the cars in San Francisco in a fabricated state, with interest and so forth. That interest, I would suggest to you, will be at the legal rate of seven per cent under the law of this state (Tr. pp. 290-291).

(u) To the instruction of the court given as follows:

The question of the amount of damages plaintiff has suffered being in controversy, the burden is upon the plaintiff to establish the amount of such damages by satisfactory evidence; that is, by evidence which produces moral certainty in your mind as unprejudiced persons, and when there is any conflict in the evidence it must preponderate in favor of the plaintiff, that is the evidence should, in your judgment, be to some extent stronger in favor of plaintiff than that which is against it. Preponderance of evidence does not mean the greater number of witnesses, for you are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, as against a less number,

or other evidence satisfying your minds. The direct evidence of one witness who was entitled to full faith and credit is sufficient to prove any fact in a case such as this (Tr. p. 291).

(v) To the instruction of the court as follows:

The evidence on behalf of plaintiff should be such as to enable the jury to determine with reasonable certainty first, that what the probable expense or cost would have been to the plaintiff to have performed the contract in its entirety, this to be determined from the different elements of cost involved in the work as disclosed in the testimony; and secondly, the probable gross quantity of steel, in tons, it would have required to complete the building; thereupon by taking the total cost to plaintiff of fabricating and delivering the material and deducting it from the gross sum produced by multiplying the number of tons of steel you find it would have taken to complete the building by the price per ton fixed in the contract, that is, \$77.00, the difference or result will be the profit which plaintiff would have made on the contract and which would represent the damages which, under the law, it would be entitled to recover (Tr. pp. 291-292).

(w) To the instruction of the court as follows:

In figuring the cost to plaintiff of fabricating the steel in question the fixed and regular monthly salaries paid by plaintiff to its permanent officers and heads of departments, without regard to this

particular work, should not be taken into account unless you find that such item of general expense in plaintiff's business would have been increased by reason of plaintiff having to carry out the entire contract, but the jury should include in the items of cost such amount as they find would be a proper allowance for wear and tear on the machinery in plaintiff's plant had the entire work contemplated by the contract been done at such plant (Tr. p. 292).

(x) To the instruction of the court as follows:

The evidence should be such as to enable you to determine the different elements which I have referred to as entering into the question of damages with reasonable certainty; mathematical certainty is not required, but such degree of certainty as will enable the jury to reach approximately just results.

You will understand as stated, that reasonable certainty in the respect mentioned is all that is required. Plaintiff is not called upon to prove his case to a demonstration. The evidence is all before you and it is for your consideration alone. It is the duty of the court to state the law and by that the jury are bound, but the facts are to be found by the jury as to all questions about which there is any conflict or controversy; and with that function it is not the province of the court to interfere.

You must be certain, however, that your verdict is based upon the evidence, and is not the result of arbitrary desire on the one hand or of surmise or speculation on the other (Tr. p. 293).

Question 3 above is raised on exceptions:

(a) To the ruling of the court admitting in evidence plaintiff's Exhibit "K" and plaintiff's Exhibit No. 3 (Tr. p. 99).

(b) To the ruling of the court denying the motion for non-suit made by defendant (plaintiff in error) (Tr. pp. 231-232).

Question 4 above is raised on exceptions:

(a) To the ruling of the court denying the motion for non-suit made by counsel for defendant (plaintiff in error) (Tr. pp. 231-232).

II.

Assignment of Errors.

Many errors are assigned in connection with the four main questions presented above, and arise principally upon the admissibility of evidence and upon the giving or the refusing of instructions. All of these latter questions, however, are subsidiary to the four questions enunciated and at most lend color to the propositions therein involved. Independent of their connection with the points made in the admissibility of the evidence, or the instructions the four main questions can be discussed

on the record. The other errors will be discussed only in connection with or incidental to the main questions. A consideration of such errors may give a clearer understanding to the contentions of plaintiff in error.

They are therefore all included in the following assignment of errors upon which the plaintiff in error will rely herein, and which it intends to urge in the prosecution of this writ of error.

ASSIGNMENT No. 11.

The court erred in refusing to give the following instruction requested by the defendant:

“I instruct you that inasmuch as it appears from the evidence that the drawings were a material part of the contract and were never completed, that the contract is void and therefore your verdict must be for the defendant.”

the same being contained in the transcript of record on pages 280 to 281 and said refusal constituting Exception No. 11.

ASSIGNMENT No. 12.

The court erred in refusing to give the following instruction requested by the defendant:

“In its third amended complaint on file plaintiff alleges that on the 19th day of January, 1907, a contract was made with the defendant whereby plaintiff agreed to deliver to defendant F. O. B. cars San Francisco, California, at \$77 per ton the quantity of structural steel and iron required by plans and specifications for the Columbia Theatre Building recited in said alleged contract, which quantity

plaintiff estimates at approximately 1500 tons and plaintiff says that by the terms of the contract plaintiff agreed to deliver all such material to the defendant before September first, 1907."

"I instruct you that unless plaintiff has established to your satisfaction by a preponderance of evidence, the existence of a contract containing all those substantial terms, to wit: the plans and specifications, the character of the work to be done, the price, the quantity to be delivered and the time of delivery, and in addition to that, established by the same preponderance of evidence that plaintiff's cost in carrying out the contract was less than the contract price, your verdict must be for the defendant."

the same being contained in the transcript of record on page 281 and said refusal constituting Exception No. 12.

ASSIGNMENT No. 13.

The court erred in refusing to give the following instruction requested by the defendant:

"It is the duty of the plaintiff to establish by a preponderance of the evidence the complete cost to plaintiff of the performance of this contract. Unless it has done so there is no evidence upon which you may base any verdict as to the amount of damages sustained by plaintiff."

the same being contained in the transcript of record on page 282 and said refusal constituting Exception No. 13.

ASSIGNMENT No. 14.

The court erred in refusing to give the following instruction requested by the defendant:

“You are not to guess at the amount of such costs, nor to enter the realm of speculation, for the burden of proving such costs is upon plaintiff, and if you are unable to find from the evidence the cost of performing the alleged contract and every item of plaintiff’s expenses in such performance, or if you are unable to conclude from the facts which are established to your satisfaction by a preponderance of the evidence what would have been the cost to plaintiff in the performance of said alleged contract, then your verdict should be for the defendant because the plaintiff in that event has not established by a preponderance of the evidence the facts which are essential to a verdict in its favor.”

the same being contained in the transcript of record on page 282 and said refusal constituting Exception No. 14.

ASSIGNMENT No. 15.

The court erred in refusing to give the following instruction requested by the defendant:

“In a case of this kind there are two distinct items as the ground of damages. *First:* What has already been expended towards performance, less the value of the materials on hand, purchased for this particular work. *Second:* The profits that plaintiff would have realized by the performance of the whole contract.

“The second item, profits, cannot always be recovered. They may be too remote and speculative in their character and therefore in-

capable of that clear and direct proof which the law requires.”

the same being contained in the transcript of record on page 283 and said refusal constituting Exception No. 15.

ASSIGNMENT No. 16.

The court erred in refusing to give the following instruction requested by the defendant:

“If it is possible for you to satisfy yourself by a preponderance of the evidence of the cost to plaintiff of the performance of this contract then before you may render a verdict as to the amount of damages it sustained, if any, you must determine from a preponderance of evidence what deduction should be made from the contract price for the time saved by plaintiff in the performance of the contract, its release from care, trouble, risk and responsibility attending a full execution of the contract; unless you are able to determine from the evidence what amount plaintiff saved in these circumstances your verdict must be for the defendant.”

the same being contained in the transcript of record on page 283 and said refusal constituting Exception No. 16.

ASSIGNMENT No. 17.

The court erred in refusing to give the following instruction requested by the defendant:

“If there is omitted from the evidence, elements of expense which the plaintiff would have incurred had the contract been performed, or elements showing the amount plaintiff saved

by not devoting all the time that would have been required in the performance of the contract and release from the risk of performance, then your verdict should be for the defendant."

the same being contained in the transcript of record on page 284 and said refusal constituting Exception No. 17.

ASSIGNMENT No. 18.

The court erred in refusing to give the following instruction requested by the defendant:

"In determining plaintiff's cost in performing said alleged contract allowance must be made for every item of cost and expense attending a full compliance with, any performance of, said alleged contract, and in estimating any profits which plaintiff claims it would have made in performing said contract you must, of course, exclude all such as are merely speculative and conjectural."

the same being contained in the transcript of record on page 284, and said refusal constituting Exception No. 18.

ASSIGNMENT No. 19.

The court erred in refusing to give the following instruction requested by the defendant:

"If you find that a contract has been established with all its essential terms, then when plaintiff ceased to perform the contract its expense ceased; its plant became free to be used in other ventures and was no longer employed in this, and if it is impossible to ascertain from the evidence what plaintiff saved on the general cost of completing the alleged contract by

not being required to perform it, then the evidence is insufficient and too speculative for you to base any just and legal verdict thereon, as to the possible profits plaintiff would have earned or damages it would have sustained."

the same being contained in the transcript of record at pages 284-5 and said refusal constituting Exception No. 19.

ASSIGNMENT No. 20.

The court erred in refusing to give the following instruction requested by the defendant:

"If you should find by a preponderance of the evidence that there was a contract between the plaintiff and the defendant it was nevertheless the duty of the plaintiff not to allow its plant to remain idle, but to use every reasonable effort to procure other work, and if it did not procure other work to take the place of the work mentioned in said contract during the time it would be employed in the performance of this contract, you should deduct the amount of profits made by the plaintiff on such other work from any sum you may find it is entitled to under the facts of this case."

the same being contained in the transcript of record on page 285 and said refusal constituting Exception No. 20.

ASSIGNMENT No. 21.

The court erred in refusing to give the following instruction requested by the defendant:

"The burden of proof in this case is upon the plaintiff. It does not devolve upon the defendant to show that the plaintiff was not

damaged by the alleged breach of contract, or if so damaged the amount of those damages. But it devolves upon the plaintiff in order to prevail to establish by a preponderance of the evidence that the alleged breach of contract in fact damaged plaintiff and the amount of such damages."

the same being contained in the transcript of record on pages 285-6 and said refusal constituting Exception No. 21.

ASSIGNMENT No. 22.

The court erred in refusing to give the following instruction requested by the defendant:

"If the evidence leaves you in doubt as to whether or not plaintiff was damaged by the breach of contract, or as to the amount of the damages, your verdict must be for the defendant."

the same being contained in the transcript of record on page 286 and said refusal constituting Exception No. 22.

ASSIGNMENT No. 23.

The court erred in refusing to give the following instruction requested by the defendant:

"In no instance are you to conjecture or surmise that plaintiff would have profited by the performance of the contract. If no facts are disclosed to you by a preponderance of the evidence which establish that the plaintiff would have profited by the performance of the contract and the amount of such profits your verdict must be for the defendant."

the same being contained in the transcript of record on page 286 and said refusal constituting Exception No. 23.

ASSIGNMENT No. 24.

The court erred in refusing to give the following instruction requested by the defendant:

“The direct evidence of one witness who is entitled to full credit is sufficient for proving any fact in this case. The evidence upon which your verdict should be based must be satisfactory evidence and that evidence only is satisfactory which produces moral certainty in an unprejudiced mind. You are not to guess at whether or not there was a contract, if any, nor guess at the amount of damages plaintiff sustained, if any, nor should you enter into the realm of speculation for the burden of proving such facts is upon the plaintiff. If you are unable to find from the evidence that there was a contract, or if you find there was a contract, but you are unable to find from the evidence the amount of damages plaintiff sustained, if any, your verdict must be for the defendant. If the evidence upon any of these questions is equally balanced your verdict must also be for the defendant.

If, after a careful consideration of all the evidence you are not able to conclude from the facts which are established that there was a contract, or if you conclude that there was a contract but that the damages claimed are too speculative or remote your verdict should be for the defendant because in none of these instances has the plaintiff established by a preponderance of evidence the facts which are essential to a verdict in its favor.”

the same being contained in the transcript of record on p. 287 and said refusal constituting Exception No. 24.

ASSIGNMENT No. 25.

The court erred in refusing to give the following instruction requested by the defendant:

“The law in this case, and indeed in every case, is that a party coming into a court of justice must satisfy the jury by what is called a preponderance of evidence as to the justice of his claim; what we mean by a preponderance of evidence is this: We cannot get a pair of scales and by some arbitrary method put on one side the testimony of plaintiff and on the other side the testimony of defendant and say which outweighs the other, or whether it is evenly balanced, but you are to try to do that mentally as far as possible.

The law says that unless the plaintiff satisfies you throughout the entire case of the correctness of his story to such an extent that it outweighs the proof of the defendant's, he cannot recover. In other words, if the testimony is evenly balanced it shows that there is some doubt in your mind; that it is not sufficient; that is, if the testimony of the plaintiff weighs just the same as that of the defendant, you must find for the defendant, that is the law. The plaintiff can only recover where his testimony outweighs that of the defendant.”

the same being contained in the transcript of record on page 288 and said refusal constituting Exception No. 25.

ASSIGNMENT Nos. 26, 27, 28, 29, 30, 31, 32 and 33.

The court erred in giving the following instruction:

“The COURT. Ordinarily I would not submit the case to you at this hour, but we are rather short of jurors on the panel and I may need your services in another case in the morning. It strikes me that this case is a very simple one, not only in its facts, but in regard to the law, and I have an idea that you will be able to reach a verdict without difficulty and without remaining out over night, or any considerable period into the night. My hesitation about submitting a case to a jury late in the day is that possibly they might get tied up and have to stay out all night. I know that is very unpleasant, but I do not apprehend any such results will follow in this case, so I will submit the case to you now. Give me your attention.”

“This is an action brought by the plaintiff to recover from the defendant the damages alleged to have been suffered by it through the breach by defendant of a contract for the fabrication and delivery of structural steel. With the nature and terms of that contract you have been made familiar and I need not recite them. There is, under the evidence, substantially but one question left for your determination in reaching a verdict, and that is as to the amount of damages, if any, plaintiff has suffered through the breach of the contract sued on.

Counsel for the defendant in his argument concedes that the plaintiff is entitled to some damages, but the amount is in controversy. While the making of the contract and its breach by the defendant are both denied in the answer the evidence shows without any conflict whatsoever that the contract was duly executed between the parties as alleged. It is

true that it does not appear that the specifications or detail drawings for all the steel to be furnished under it have been completed by the architect, but it does appear without controversy that those specifications were so far completed as that both parties treated the contract as ready for execution to the extent the specifications and drawings had been furnished, and that plaintiff at the direction and request of defendant had entered upon its execution so that for all purposes affecting the rights of the parties here involved the contract is to be regarded as having been duly executed. As to the alleged breach of the contract by the defendant the action of the defendant as disclosed by the correspondence between the parties and which is wholly uncontroverted, directing the stopping of all work under the contract and stating that the contemplated structure had been abandoned, justified plaintiff in treating the contract as at an end, and constituting in law a breach of the contract by defendant. You would not be justified, therefore, under the evidence in finding against either the execution of the contract by the parties or its breach by the defendant as counted upon.

This leaves, as I have said, but one substantive question for your consideration, and that is the question of damages.

The rule or measure of damages which may be recovered for the breach of a contract such as this is the difference between the consideration stipulated to be paid under the contract for its performance and the cost of such performance. That is to say, under the contract in suit, the damages plaintiff will be entitled to at your hands is the difference between the agreed price per ton for the quantity of structural steel which you may find from the evidence would have been required to complete

the contemplated building in its entirety as provided in the contract, less what you may find it would have cost the plaintiff to have completed the fabrication and delivery of such entire quantity of steel; in other words, the plaintiff is entitled to the agreed price per ton of the entire quantity of material covered by the contract to be furnished by it, less what it would have cost to deliver it free on board the cars in San Francisco in a fabricated state, with interest and so forth. That interest I would suggest to you will be at the legal rate of seven per cent under the law of this state.

The question of the amount of damages plaintiff has suffered being in controversy, the burden is upon the plaintiff to establish the amount of such damages by satisfactory evidence, that is by evidence which produces moral certainty in your mind as unprejudiced persons, and when there is any conflict in the evidence it must preponderate in favor of the plaintiff, that is, the evidence should, in your judgment, be to some extent stronger in favor of plaintiff than that which is against it. Preponderance of evidence does not mean the greater number of witnesses, for you are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds as against a less number or other evidence satisfying your mind. The direct evidence of one witness who is entitled to full faith and credit is sufficient to prove any fact in a case such as this.

The evidence on behalf of plaintiff should be such as to enable the jury to determine with reasonable certainty, first, what the probable expense or cost would have been to the plaintiff to have performed the contract in its entirety, this to be determined from the different elements of cost involved in the work as dis-

closed in the testimony; and, secondly, the probable gross quantity of steel in tons it would have required to complete the building. Thereupon, by taking the total cost to plaintiff of fabricating and delivering the material and deducting it from the gross sum produced by multiplying the number of tons of steel you find it would have taken to complete the building by the price per ton fixed in the contract, that is, \$77, the difference or result will be the profit which plaintiff would have made on the contract and which would represent the damages, which, under the law, it would be entitled to recover.

In figuring the cost to plaintiff of fabricating the steel in question, the fixed and regular monthly salaries paid by plaintiff to its permanent officers and heads of departments without regard to this particular work, should not be taken into account unless you find that such items of general expense in plaintiff's business would have been increased by reason of plaintiff having to carry out the entire contract; but the jury should include in the item of cost such amount as they find would be a proper allowance for wear and tear on the machinery in plaintiff's plant had the entire work contemplated by the contract been done at such plant.

The evidence should be such as to enable you to determine the different elements which I have referred to as entering into the question of damages with reasonable certainty; mathematical certainty is not required, but such degree of certainty as will enable the jury to reach approximately just results.

You will understand, as stated, that reasonable certainty in the respect mentioned, is all that is required; plaintiff is not called upon to prove his case to a demonstration; the evidence is all before you and it is for your consideration alone. It is the duty of the court to

state the law and by that the jury are bound, but the facts are to be found by the jury as to all questions about which there is any conflict or controversy; and with that function it is not the province of the court to interfere.

You must be certain, however, that your verdict is based upon the evidence and is not the result of arbitrary desire on the one hand or of surmise or speculation on the other.

The clerk has prepared forms of verdict for you, gentlemen of the jury, which you will make out in this case as indicated to you by my instructions. When you have reached a conclusion you will report to the court. As it has been suggested, the plaintiff will be entitled to some verdict at your hands, so the other form of verdict which the clerk has drawn up will not be required and all that it will be necessary for you gentlemen to do is to fill in the amount of damages which you may find in favor of the plaintiff. You will bear in mind that in the federal court the verdict of the jury must be unanimous, and cannot be by a less number as in the state courts. You may now retire, gentlemen of the jury."

the same being contained in the transcript of record on pages 288-294, and the giving thereof constituting Exceptions Nos. 26, 27, 28, 29, 30, 31, 32, 33.

ASSIGNMENT No. 2.

The court erred in overruling the objection of counsel for the defendant (plaintiff in error) to the introduction in evidence at the trial of said cause of a certain proposition which purports to be a proposition by the Modern Steel Structural Company, dated Waukesha, Wisconsin, January 4, 1907, to the American-Pacific Construction Com-

pany, whereby the Modern Steel Structural Company agreed to furnish the structural steel and iron and reinforcing steel (except the grillage beams, bolts, separators and column bases mentioned on page 3 of specifications referred to in said proposal) for the Richelieu Syndicate Theatre and Office Building known as the Columbia Theatre, located southeast corner Van Ness Avenue and Geary Street, San Francisco, California, being plaintiff's Exhibit "K", and which was and is in exactly the following words and figures, to wit:

"Modern Steel Structural Co.

Waukesha, Wis., Jan. 4, 1907.

American-Pacific Construction Co.,

San Francisco, Cali.

We propose to furnish you in good order the following described structural material constructed in a workmanlike manner described as follows and in accordance with drawings furnished by Joseph D. Smedberg and specifications also furnished by J. D. Smedberg, identified with marks:

'Copy No. 1', initialed, 'S. B. H. 12/30/06', excepting as noted under 'REMARKS' on sheet No. 2 attached.

Namely the structural steel and iron and reinforced steel (except the grillage beams, bolts, separators and column bases mentioned on page 3, of specifications referred to above) for the Richelieu Realty Syndicate Theatre and Office Building, known as the Columbia Theatre; location, southeast corner of Van Ness and Geary Street, San Francisco, Cali.

Delivery as follows: *That portion indicated by Mr. Smedberg, shown within red lines on blue prints 3-S, 4-S, 7-S, dated by us on back of print as received Dec. 31, 1906, and 8-S, dated by us on back of print as received Jan.*

3, 1907, required to begin erection of steel work on stores to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg.

Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg.

REMARKS. Our proposition is based on the substitution in part (as referring to '*Kind, Character and Finish of Materials*' beginning on page 9 and '*Inspection*' beginning page 11 of the above specifications) of Manufacturers' Standard Specifications as found in Carnegie's Hand Book.

Mill Test Reports, within said specifications are proposed as being satisfactory in the above respects to Mr. Smedberg, and upon his request stating upon which portions of the work he will require such reports, we will comply therewith by furnishing same.

We also agree that the tonnage is to be determined and paid for by certificates from the Western Weighing Association at the point of shipment. It is understood that the AMERICAN-PACIFIC CONSTRUCTION COMPANY, at their own expense, will weigh same at the public scales in San Francisco, and should they prove that the weights so certified by the Western Weighing Association at point of shipment are not correct, we hereby agree to reimburse the AMERICAN CONSTRUCTION COMPANY, the amount overpaid us.

Price to be Seventy-seven dollars (\$77.00) per ton: Freight allowed to San Francisco, Cali. Correct figured weights of steel to govern amount of sale and all steel work to be accepted at our works by Mr. Smedberg, or his authorized agent.

Terms of payment as follows: 30 days net cash from date of invoices.

Payable in New York, Chicago or Milwaukee exchange, free of expense to us for the collection charges.

We are responsible for shop errors in work not erected by ourselves and for alterations, whether erected by ourselves or not, only when notified of same in writing before correction is made and given an opportunity and reasonable time to suggest remedy or to ourselves make alterations.

When delays are caused to our men by material or labor not furnished by us, you agree to pay their time, at our regular rates and their expenses, while so delayed.

This contract is contingent upon our ability to procure material from the mills, delays of carriers and upon strikes, accidents or other delays unavoidable or beyond our reasonable control.

It is expressly agreed that there are no promises, agreements of understandings outside of this contract and that no agent or salesman has any authority to obligate the MODERN STEEL STRUCTURAL COMPANY by any terms, stipulations or conditions not herein expressed.

The title and right of possession to all material we furnish remains with the MODERN STEEL COMPANY until the same has been fully paid for in cash.

This proposition is for immediate acceptance, but although accepted does not constitute a contract until approved by an executive officer of the Modern Steel Structural Company, and is subject to change or withdrawal until so approved.

In case any difference of opinion shall arise between the parties to this contract in relation to the contract, the work to be or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract, and these two shall have the power to

name an uninterested umpire (testimony of F. W. Harding), whose decision shall be binding on all parties to the contract.

Ship via:

MODERN STEEL STRUCTURAL Co.,
Accepted Jany. 17, 1907, by S. B. H.

Approved by S. B. Harding, Pres.

AMERICAN-PACIFIC CONSTRUCTION Co.,
Thomas Vigus,
General Manager."

and admitting the same in evidence as shown in the transcript of record on pages 99 and 190-196, and said ruling constituting Exception No. 2.

ASSIGNMENT No. 3.

The court erred in overruling the objection of counsel for the defendant (plaintiff in error) to the following question asked by counsel for plaintiff of the witness, Samuel B. Harding:

" 'Does it indicate the acceptance of the contract?' To which question witness replied, 'It indicates that I, on receipt of that letter and enclosure, gave the job a number, and contract as it were, through which it would be known in our plant by number. That is the custom whenever we receive an accepted contract, to at once give it a number.' "

and admitting the same in evidence as shown in the transcript of record on page 276, and said ruling constituting Exception No. 3.

ASSIGNMENT No. 4.

The court erred in overruling the objection of counsel for the defendant (plaintiff in error) to the introduction in evidence at the trial of said

cause of certain specifications made by Frank T. Shay, Architect, San Francisco, and Joseph D. Smedberg, Consulting Engineer, San Francisco, which purported to be specifications for the structural steel and iron of an eight-story office building and theatre to be erected on the southeast corner of Van Ness Avenue and Geary Street, for the Richelieu Syndicate, San Francisco, Cal., being plaintiff's Exhibit "M", and admitting the same in evidence as shown in the transcript of record on page 276, and said ruling constituting Exception No. 4.

ASSIGNMENT No. 5.

The court erred in overruling the objection of counsel for the defendant (plaintiff in error) to the introduction in evidence at the trial of said cause of certain detail drawings consisting of 31 sheets on tracing cloth, made by the Modern Steel Structural Company, which purported to be detail drawings for a part of the structural steel work for said Columbia Theatre Building, being plaintiff's Exhibits "A", "B", etc., and annexed to defendant's bill of exceptions, and marked Exhibit "A" and admitting the same in evidence, as shown in the transcript of record on pages 276-277, and said ruling constituting Exception No. 5.

ASSIGNMENT No. 6.

The court erred in overruling the objection of counsel for said defendant (plaintiff in error) to

the following question asked by counsel for plaintiff of the witness, Samuel B. Harding:

“ ‘Now, Mr. Harding, I will ask you if at all times during the months of March, April, May and June, 1907, the plaintiff stood ready and willing to carry out the contract with the defendant?’ to which question the witness replied, ‘It did.’ ”

and admitting the same in evidence as shown in the transcript of record on page 277, and said ruling constituting Exception No. 6.

ASSIGNMENT No. 7.

The court erred in refusing to grant the motion of counsel for said defendant (plaintiff in error) to strike out the following portion of the answer of the witness Samuel B. Harding:

“ ‘And my reasons for that statement would be this: The American-Pacific Construction Company, through Mr. Vigus, talked of 1400 tons; the architect and his engineer talked of 14 or 1500 tons, as I remember it; now the architect’s plans—I am speaking now of the original plans from which we made our detail drawings—were incomplete at the time we began work and Mr. Smedberg came up for the purpose of completing these drawings, and insofar as we went in examining the original drawings prepared by the architect, we found a number of places where they were not up to the ordinances, and that was the occasion of our writing our letter of March 26, marked Exhibit “O”, calling attention to the discrepancies, and I therefore, from such investigations and discrepancies found, think that the building would run up to the 1500 ton mark, if not more, as these increases spoken of are 20 per

cent or 25 per cent. Of course this would not apply to all the structure.' The question propounded to the witness was: 'But 1500 tons at least according to these specifications?' To this question the witness answered 'Yes,' and proceeded as stated before."

and admitting the same in evidence as shown in the transcript of record on pages 277-278, and said refusal constituting Exception No. 7.

ASSIGNMENT No. 8.

The court erred in overruling the objection of counsel for said defendant (plaintiff in error) to the following question asked by counsel for plaintiff of the witness, Frederick Hoffman:

" 'From your examination of the drawings and specifications of the buildings, in your judgment, what quantity of structural steel was required to carry out the plans and specifications for the Columbia Theatre Building in question?' to which question the witness replied: 'In my judgment it would take in the neighborhood of 1500 tons.' "

and admitting the same in evidence as shown in the transcript of record on page 278, and said ruling constituting Exception No. 8.

ASSIGNMENT No. 9.

The court erred in sustaining the objection of counsel for plaintiff to the following question asked by counsel for defendant (plaintiff in error) of the witness, Thomas Vigus:

" 'With whom did you have that conversation'? It was admitted that the conversation

sought to be elicited was had with S. B. Harding, the president of the plaintiff company,"

and excluding the same from evidence as shown in the transcript of record on pages 278-279, and said exclusion constituting Exception No. 9.

ASSIGNMENT No. 10.

The court erred in denying the motion of counsel for defendant (plaintiff in error) for a judgment of non-suit and dismissal. Said motion being made on the following grounds:

"1. That there is a failure of proof in the following particulars:

a. It is not shown by the evidence that there has been a complete contract; on the contrary, the evidence shows that the contract is incomplete and imperfect in this:

That the proposal which is set forth in the evidence here and dated the 4th day of January, 1907, states that the defendant was to furnish certain structural steel in accordance with drawings and specifications to be furnished by Joseph Smedberg, which were identified with certain marks. It affirmatively appears from the evidence that those drawings have never been made or furnished.

2. There is a variance in this: The contract alleged required the plaintiff to deliver to defendant at San Francisco the fabricated steel on or before the 1st day of September, 1907, while the contract placed in evidence by plaintiff required delivery to be made within sixty or ninety days after completion of the detailed drawings.

3. There is a variance in this: The contract alleged states that there was an agreed tonnage of 1500 tons of steel to be furnished, while the

contract placed in evidence shows there was no agreed tonnage.

4. The action is premature inasmuch as the contract offered in evidence provides: 'In case any difference of opinion shall arise between the parties to this contract in relation to the contract, the work to be, or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract, and these two shall have the power to name an uninterested umpire whose decision shall be binding on all parties to the contract.' From the evidence it appears that there was no arbitration, and therefore the action is premature.

5. There is no evidence of damages. The attempt to show loss of profits or damages failed. There is absolutely no evidence of the costs, hence there is no way of determining any damages, except by guesswork."

as shown in the transcript of record on pages 279-280 and said denial constituting Exception No. 10.

To the discussion of the questions involved in the case as reflected by the propositions advanced in the rulings and instructions which constitute the foregoing assignment of errors we shall now proceed.

III.

Argument.

I.

THE PROPOSAL OF THE DEFENDANT IN ERROR AND ITS ACCEPTANCE BY THE PLAINTIFF IN ERROR DID NOT CONSTITUTE A VALID OR ANY CONTRACT (Exhibits "K" and No. 3, p. 99) BECAUSE:

(a) It was incomplete because although it contemplated furnishing all the structural steel re-

quired for a building to be constructed in accordance with the drawings and specifications to be furnished by Joseph D. Smedberg, such drawings were never made and the specifications were never completed and therefore there was no means of knowing or determining the character and quantity of steel to be furnished.

(b) Neither drawings nor specifications were ever attached to nor made a part of, said proposal; and neither the drawings nor specifications were ever completed. The partially completed specifications referred to drawings for the description of character and quantity of material, but such drawings were never completed. Therefore, it was impossible for either party to know the quantity of steel to be fabricated; the manner in which it was to be fabricated; or the size, form, weight or appearance of the various steel members entering into said building or the cost of fabricating the same. The said alleged contract is uncertain and indefinite inasmuch as it does not indicate in any manner, the amount of steel to be fabricated, or the size (long, short, broad or narrow) weight (light or heavy) form, appearance or style into which the various steel members of the proposed building were to be fabricated. Hence, the defendant in error never could fabricate the steel required for the building, the drawings and designs for which were never furnished; until they were finished even the architect of the proposed building could not describe any of its members, even though in his mind he had

formed some conception of its exterior design. No architect, engineer or other person could estimate the quantity without the drawings, as without them there would be no basis for such estimate.

Even a casual reading of said Exhibit "K" shows it to be a mere indefinite proposal. It is designated a proposal. It was submitted by the defendant in error and under familiar legal principles must be construed against it and in favor of the plaintiff in error.

There can be no contract, so called, enforceable at law unless its terms are certain, and the minds of the parties to the contract have met and agreed on its terms. This is horn-book law. It is so elementary and the authorities bearing thereon so numerous and relate to cases of such varying circumstances that only a few, illustrative of these principles, are cited:

Sec. 1598 of the Civil Code of the State of California provides: "Where a contract has but a single object, and such object is unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void."

In *Nave v. McGrane* (decided by the Supreme Court Idaho in 1910), 113 Pac. 82, the action was one to recover the alleged contract price for certain building plans and specifications, prepared by plaintiff as an architect, for the defendant. It appeared that plaintiff undertook to furnish complete plans

and specifications to do whatever was necessary, according to the use and custom of architects and builders, to enable defendant to receive bids and let a contract and to accept as compensation therefor a percentage of the lowest responsible bid.

In the opinion, after reviewing a number of authorities as to the nature of plans and specifications, it is said (113 Pac. 85):

“If the plans and specifications were not definite and certain as to the kinds and qualities of material to be used, the class of workmanship, etc., the time within which the building must be completed, the method of making payments and other matters, *the bid to construct the building would only indicate a willingness to negotiate further in regard to the matters not specified, and an acceptance would express a like willingness, but would not bind either party. If they did not subsequently agree upon a contract, each would be without remedy against the other.*

“In *Gill Mfg. Co. v. Hurd* (C. C.), 18 Fed. 673, the court held that in order to constitute a contract the minds of the parties must meet and agree upon the terms of it. *If any part remains to be settled, the agreement is incomplete.*

In *Shepard v. Carpenter*, 54 Minn. 153, 55 N. W. 906, the court held that an agreement to enter into a contract in the future, in order to be enforceable, must express all the material and essential terms of such future contract, *and not leave any of them to be agreed on in the future.*”

In *Price v. Stipek*, 104 Pac. 195, the complaint alleged that defendant gave an order for certain

goods by virtue of his having signed a memorandum of sale attached to the complaint as "Exhibit A". Said exhibit contained a list of a large number of articles of jewelry of various kinds, qualities and prices, and concluded with a request to ship "the goods listed in this order upon the terms named therein and no others, all of which I fully understand and approve."

In the opinion, after stating the facts, the Supreme Court of Montana said:

"It is an elementary rule of the law that, to constitute a contract, *the subject-matter of the agreement must be expressed by the parties with a reasonable degree of certainty.* 7 Am. & Eng. Enc. Law (2d ed.) 116. In *Thomson v. Gortner*, 73 Md. 474, 21 Atl. 371, the court said: 'The law is too well settled to admit of doubt that, in order to constitute a valid verbal or written agreement, the parties must express themselves in such terms *that it can be ascertained to a reasonable degree of certainty what they mean.* And, if an agreement be so vague and indefinite that it is not possible to collect from it the full intention of the parties it is void, for neither the court nor the jury can make an agreement for the parties. Such a contract can neither be enforced in equity nor sued upon at law. It is hardly necessary to cite any of the numerous authorities that sustain this plain legal proposition.' Doubtless this *Exhibit A*, when signed by the defendant, was intended to be an offer which upon acceptance by the plaintiffs would constitute a contract, and such result would have followed if the defendant had indicated what it was he proposed to purchase. Upon the subject of offer and acceptance Page in his work on contracts says: 'The offer must not merely be complete

in terms, but the terms must be sufficiently definite to enable the court to determine ultimately whether the contract has been performed or not. If no breach of the contract could be assigned which could be measured by any test of damages from the contract, it has been said to be too indefinite to be enforceable.' Page on Contracts, Sec. 28. And Parsons on Contracts, speaking of agreements for the sale of personal property, announces the same rule in the following language: 'The price to be paid must be certain, or so referred to a definite standard that it may be made certain. * * * And the thing sold must be specific, and capable of certain identification.' 1 Parsons on Contracts (9th ed.) p. 524.

"With these elementary principles before us, we search this instrument in vain for an answer to any of the following inquiries: *How many articles of any particular kind or class are ordered? What is the particular quality of the articles intended to be purchased, and what prices are to be paid for the several articles?* Did the defendant intend to order some articles of every description listed by plaintiffs in this Exhibit A, or did he intend to order only a portion of them? Did he intend to order belt buckles worth 15 cents each, or belt buckles worth \$2 each? This exhibit does not itself answer any of these inquiries, and neither does it refer to any other source from which the information can be obtained. The instrument is clearly of that character which in Section 4999 Rev. Codes [the same as Sec. 1598 of the California Civil Code] is declared to be void in the following language: 'Where a contract has but a single object, and such object is * * * so vaguely expressed as to be wholly unascertainable, the entire contract is void.'

"Because this instrument is so indefinite and uncertain in its terms that the intention of the

parties cannot be ascertained, we hold that it is not a contract, enforceable at law, and that the complaint, based upon the alleged breach of it, does not state facts sufficient to constitute a cause of action."

In *Levy v. Mantz*, 16 Cal. App. 666, 670, it is held that the due execution of a contract requires the assent of at least two minds to each and all of the essentials of the agreement; and it is only upon evidence of such assent that the law enforces the terms of the contract.

In *Grafton v. Cummings*, 99 U. S. 106, the court said:

"In an agreement of sale * * * there must be a *sufficient description of the thing sold and of the price to be paid for it*. It is, therefore, an essential element of the contract, that it shall contain within itself a description of the thing sold by which it must be known or identified."

In *Almini Company v. King*, 92 Ill. App. 276, defendant in error sued to recover damages for the failure of plaintiff in error to comply with the terms of an alleged contract in writing by which it is said to have agreed to do the painting and glazing upon a house in process of construction. The contract referred to plans and specifications as "herein made a part" of it.

In holding the contract unenforceable, the court said:

"They are not, however, attached to the instrument, nor is there anything in the contract to locate or identify them in any way. The contract, therefore, as offered, and upon which de-

fendant in error bases his claim to recover, is incomplete. The original specifications, as prepared, were introduced, but there is no evidence that they were ever seen by the Almini Company, or its agents, either before or at the time the contract was signed, or that they ever were in any way attached to or made a part of or identified in the contract, and there is no evidence to the contrary. The incomplete contract was not admissible in evidence and the objection thereto should have been sustained."

Also:

Wait Eng. & Arch. Juris., Secs. 214-695;

Worden v. Hammond, 37 Cal. 61;

Willamette etc. Co. v. College Co., 94 Cal. 229;

Donnelly v. Adams, 115 Cal. 129;

Moir v. Brown, 14 Barb. 39, 50;

Kercheis v. Schloss, 49 How. Pr. 284-286;

Adams v. Hill, 16 Me. 215.

No case can be cited in which a contract as incomplete or as uncertain as the alleged contract in the case at bar was ever sustained.

Remembering the principles announced above, we quote from the proposal:

"*Proposal from the Modern Steel Structural Company*", dated "Waukesha, Wis. Jan. 4, 1906". "We propose to furnish you in good order the following described structural material, constructed in a workmanlike manner *described as follows and in accordance with* DRAWINGS FURNISHED BY JOS. D. SMEDBERG and SPECIFICATIONS ALSO FURNISHED BY JOS. D. SMEDBERG, IDENTIFIED WITH MARKS: "Copy

#1, initialed, 'S. B. H. 12/30.06','" excepting as noted under marks on sheet #2 attached, namely, the structural steel and iron, etc."

The proposal in providing for the time of delivery, states that certain of the structural material was,

"to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg. Balance of steel shipments to be 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg."

As it will be seen from the specifications (Tr. p. 107) they do not contain any description of the structural material in question, but refer to the drawings. *The specifications admitted in evidence were not attached to the alleged "contract"* nor were they complete in themselves nor did they contain the identifying marks. How could they be complete, when they did not pretend to cover the theatre portion of the proposed building?

It must be conceded by the defendant in error—the uncontradicted evidence forces the concession:

1. *That the drawings referred to in the said proposal were never completed nor furnished nor signed by Joseph D. Smedberg, the engineer employed by the Richelieu Realty Syndicate and by its architect.*

(Specifications Tr. pp. 107, 108, 110, and 111 to 124.)

(Test. S. B. Harding, Tr. pp. 104, 131, 165.)

(Test. F. W. Harding, Tr. pp. 201, 255.)

(a) Even the drawing for the upper part of the office portion of the building was not completed when the proposal was accepted.

Testimony S. B. Harding (Tr. p. 104).

(b) The papers or drawings, so called, in evidence, are mere detailed drawings prepared by the defendant in error for a small part of the office part of the building and mostly cover the thirty-nine and one-fourth tons of steel shipped to plaintiff in error (Tr. bottom pp. 201, 202).

These papers or drawings are not architectural plans. They are what are known as steel drawings, some of them being shop details, and there is nothing among them from which one could make an estimate of the total steel for the building (Tr. pp. 247-248).

All the drawings and material sheets in evidence taken together, only cover or represent 256 to 262 tons of steel (Tr. 237; also p. 241).

(c) There is no paper or drawing or anything else in the record from which any engineer could determine how many tons of steel would be required to complete the proposed or projected building. *This is not denied.*

Testimony William Breite, Tr. p. 234, p. 235;

Testimony Peter Zucco, Tr. p. 241;

Testimony John D. Galloway, Tr. pp. 247, 248.

2. *The drawings for the theatre portion of the building were never completed.*

See,—

The specifications of building offered in evidence by defendant in error (plaintiff below) over the objections of plaintiff in error, contain the following:

“The general plans for the Theatre portion of the building being incomplete still, the intention is to erect the Office Building portion first and especially rush work on the first section columns, first and second story beams and sidewalk beams. Open holes in columns, beams and girders for connecting Theatre Cantilevers, etc., will be drilled in the field as arrangements of theatre framing cannot be determined accurately at present, and this method will not delay any portion of the office building construction due to lack of information regarding connection” (Tr. p. 108).

F. W. Harding, vice president of defendant in error, testified that the drawings as far as the theatre was concerned were never prepared (Tr. p. 255; also p. 201).

S. B. Harding, president of the defendant in error, speaking of the drawings for the building, testified they were only completed in part (Tr. p. 131; also p. 165).

3. The “theatre” was intended to constitute more than one-half of the proposed combined office and theatre building.

F. W. Harding, vice-president of the defendant in error, testified that the theatre would constitute from forty to fifty per cent of the entire building (Tr. p. 254, p. 255).

C. H. Snyder, contracting engineer with Milliken Brothers, manufacturers of structural steel, testified that the theatre would constitute more than one-half the ground floor, and up to the sixth story of an eight story building (Tr. pp. 245-246).

John D. Galloway, structural engineer, testified that the theatre would constitute seventy-five per cent of the proposed combined building (Tr. p. 249).

Also see Specifications (Tr. p. 108).

It is not even claimed by defendant in error that the architectural design or the general plan or any of the drawings for the theatre were ever made. And it must be admitted, because there is no testimony to the contrary, that the theatre would constitute more than one-half of the proposed combined office and theatre building.

The essential elements of the alleged contract in question are the quantity of steel to be furnished and the price to be paid on the performance of the contract. The "proposal" required the payment of seventy-seven (77) dollars per ton for every ton of steel delivered and required defendant in error to furnish all the steel *required by the drawings and specifications to be thereafter completed*. As to the price the proposal required the payment of \$77 per ton for every ton of steel delivered; and the quantity of steel to be delivered depended on *drawings to be prepared* and which were never prepared. These drawings and

specifications were never completed in *most material parts*. They were not even *completed for the office part of the building* and none of them bearing on the theatre part *was even started*. Therefore we have this condition: plaintiff in error was required to pay \$77 per ton for an amount of steel *to be determined in the future*, which amount defendant in error was required to furnish, and this amount was never determined.

This omission is fatal to the validity of the contract. It is *inchoate, incomplete and uncertain*.

Civil Code of California, Sec. 1598;
Nave v. McGrane, 113 Pac. 82;
Price v. Stipek, 104 Pac. 196;
Levy v. Mantz, 16 Cal. App. 666-670;
Grafton v. Cummings, 99 U. S. 106;
Gill Mfg. Co. v. Hurd, 18 Fed. 673;
Almini Co. v. King, 92 Ill. App. 276.

B.

NEITHER DRAWINGS NOR SPECIFICATIONS WERE ATTACHED TO NOR MADE A PART OF SAID PROPOSAL; AND NEITHER THE DRAWINGS NOR SPECIFICATIONS WERE IDENTIFIED BY THE MARKS SPECIFIED IN THE PROPOSAL OR ALLEGED CONTRACT, NOR WERE EVER COMPLETED. THEREFORE THE CONTRACT WAS INCOMPLETE AND VOID.

“Very often many of the important stipulations and conditions of a contract are incorporated into the specifications as general conditions applicable to almost any work and they should be made a part of the contract with certainty. The plans showing the extent and size of the work undertaken, and specifications

describing it and the materials to be used, and the direction as to the performance of the contract are a necessary and important part of the contract. They are as binding as are the terms and covenants of the contract."

Wait, Engineering and Architectural Jurisprudence, Sec. 214.

"The amount of work to be performed, which may be taken as the basis of such an estimate of the cost are the quantities given in the specifications or shown on the plans and described in the contract, and it is submitted that the advertisement and proposal might be utilized, if the contract, specifications and plans did not furnish an estimate of its magnitude but not it seems estimates by the company's engineers made after the contract was entered into."

Wait Engineering and Architectural Jurisprudence, 634, Sec. 695.

In *Worden v. Hammond*, 37 Cal. 61 at page 64, the court said:

"The specifications are an essential part of the contract, and are as material as the price of the work or the terms of payment; for the contract price was not to be paid until the barn was completed according to the specifications. It is not indispensable that the specifications be signed by the party to be charged, but it will be sufficient if they are referred to with certainty. *But where the reference is false, it cannot be helped out by oral evidence. Here the specifications were referred to as annexed to the contract, and when the plaintiffs were permitted to introduce in evidence, as the specifications referred to, a paper which*

they admitted was never attached to the contract, if they did not thereby contradict the written contract, they added to its terms by oral evidence."

In *Willamette etc. Co. v. College Co.*, 94 Cal. 229, at page 233, the court said:

"The insertion of this clause in the contract made the drawings and specifications an essential part thereof, as material as was the price of the work or the terms of payment; and until they were 'annexed' to the contract so that its entire terms could be ascertained by mere inspection, and without oral testimony, the contract was only inchoate and not complete, and could not form the basis of a recovery."

The two cases from which the foregoing quotations are taken are approved in *Donnelly v. Adams*, 115 Cal. 129, 131:

"The only distinction between the contract in the case at bar and those considered in the cases cited lies in the fact that in the present instance the reference is to specifications *signed* in the other it was to specifications *attached*. But the one reference is no less significant and essential than the other. If the specifications be not signed, or if they be not attached, in either case there is a false reference in a written contract which cannot be aided by parol evidence. In both cases the contract is left 'inchoate and not complete, and could not form the basis of a recovery'."

To the same effect see

Gilmore v. Lycoming Fire Ins. Co., 55 Cal. 123.

This same principle is applied in cases where an assignment is made for the benefit of creditors and reference is made to schedule attached, etc. Of course, it is held in these cases that in the absence of the schedule, the contract is rendered so indefinite and uncertain as to be unenforceable.

Moir v. Brown, 14 Barb. 39, 50;

Merchers v. Schloss, 49 How. Pa. 286.

The principle underlying all these cases sustains without question the contention that while some of the terms and conditions of a contract need not appear in the contract itself, but may be referred to as being contained in an attached document, still where such a reference is made to a document *as being attached* or *as being "signed"* or *otherwise "identified"* by marks or otherwise, and it is not *"attached"* or so *"signed"* or so *"identified"* by marks or otherwise. The contract is void.

In this case the drawings, from which could be determined the essential element of quantity, were omitted.

The "alleged contract", received in evidence over our objection, refers to drawings and specifications "identified with marks: Copy No. 1, Initialed S. B. H. 12/30/06" (Tr. p. 99).

The specifications received in evidence do not bear these identifying marks (Tr. pp. 106-124). Hence our objection (Tr. p. 105).

The initials "S. B. H." are the initials of Samuel B. Harding, the president of the Modern Steel

Structural Company, defendant in error. The contract was to be performed in accordance with specifications so identified, and in accordance with no other specifications. The specifications received in evidence are not so identified. *Therefore the reference in the contract to the specifications is false, and cannot be helped out by oral evidence.*

Donnelly v. Adams, supra;

Willamette Co. v. College Co., supra;

Worden v. Hammond, supra.

As the reference is false and cannot be aided by parol evidence, the alleged contract is left "inchoate and not complete, and could not form the basis of a recovery." (*Donnelly v. Adams, supra.*)

Obviously the rule announced is correct. Without completed drawings and identified specifications no one could determine the size, weight, or appearance of the various steel members which would enter into the finished building. Without a completed design no one could surmise what the general appearance or shape even of the exterior of the theatre would be.

As was said in *Nave v. McGrane*, 113 Pac. 82, at page 85:

"If the plans and specifications were not definite and certain as to the kind and qualities of material to be used, the class of workmanship, etc., the time within which the building must be completed, the method of making payments and other matters, the bid to construct the building would only indicate a willingness to negotiate further in regard to the matters

not specified, and its acceptance would express a like willingness, 'but would not bind either party if they did not subsequently agree upon a contract, each would be without remedy against the other.'"

In the case at bar both the specifications and drawings being incomplete and unidentified it was open to the owner and the contractor practically to plan their own building, or by failing to agree on drawings and specifications to avoid the contract.

It is a matter of daily observation that buildings of the same dimension may vary considerably in the amount of steel required for their constituent members. Some eight story buildings are often constructed with columns, beams and girders of sufficient strength and weight to carry additional stories; while others are constructed with columns, beams and girders as light and thin as the nature of the structure will permit. It is also a matter of common knowledge that one architect will design a building with massive pillars and numerous steel ornaments of great weight, while another will boast of the simplicity, lightness and plainness of his design. Since these conditions are true, how may we know the number of tons of steel that may be required for a structure until the drawings are completed. Therefore, as the specifications referred to drawings which were ~~nearly~~^{never} completed, even if they had been identified as required by the contract, and admittedly they were not, the amount of steel required could never be determined.

To bring out in strong relief the incomplete, uncertain and indefinite nature of this alleged contract, it is only necessary to put this inquiry: Suppose the defendant in error in this action had refused to furnish the materials contemplated by its proposal, and the plaintiff in error insisted that it was entitled to performance upon the part of the defendant in error, what structural material, with reference to tonnage, size, dimensions, character, etc., would the defendant in error be compelled to furnish? In the absence of plans, specifications and detail drawings, it would be absolutely impossible to determine just what would be required.

II.

EVEN IF IT WERE ASSUMED THAT THE PROPOSAL AND ACCEPTANCE CONSTITUTED A COMPLETED, VALID CONTRACT THE JUDGMENT MUST BE REVERSED BECAUSE NO DAMAGE IS SHOWN.

In the preceding main division of this brief we have shown that there is no valid contract, the breach of which would sustain an action for damages. The defendant in error in its three successive complaints filed in this action *insisted on maintaining an action for damages for breach of an express contract*. It does not seek to recover the value of the steel sold and delivered. In such an action plaintiff in error might have been compelled to admit judgment for the steel fabricated

and delivered, viz.: for \$3021.90. Defendant in error elected to maintain its action for damages.

Assuming that the action is one for the recovery of damages for the breach of an express contract the general rule is that the damage recoverable is the difference between the cost of performing the contract and the contract price.

See

Hinckley v. Pittsburg Bessemer Steel Co.,
121 U. S. 264;

U. S. v. Behan, 110 U. S. 338;

Sullivan v. McMillan, 8 So. 450 (Fla.);

Wells v. Association, 99 Fed. 222, 53 L. R.
A. 33 (extended note);

Goodrich v. Hubbard, 51 Mich. 63, 16 N. W.
232.

The rule announced is subject to the qualifications that a reasonable deduction is to be made for the less amount of time required by the plaintiff, its employees and factory and for the release from trouble, risk and responsibility attendant upon a full execution of the contract on the part of the plaintiff.

Kimball v. Deere, 108 Iowa 685, 77 N. W.
1041-1044;

U. S. v. Speed, 8 Wall. 77;

McMaster v. State, 108 N. Y. 542, 15 N. E.
417.

In *Insley v. Shepard*, 31 Fed. 869, at page 873, the court said:

“The plaintiffs’ proof as to the amount of profits which they would have made by the performance of the work *is not disputed, or in any way contradicted by the defendants*; but the court must assume that there should be a reasonable deduction from this theoretical amount of profit for a ‘*release from care, trouble, risk and responsibility, attending a full execution of the contract*’. The execution of the contract in question involved considerable risk. The piers which were to be erected by the contractors might have been washed out by a freshet in the river; a span, or some portion of their trestle work might have been destroyed by high water; there might have been delays by bad weather, or inability to procure material, to such an extent as to have very materially reduced the theoretical profits upon this contract. The figures of the plaintiffs’ witnesses are based on the assumption that there would be no drawbacks nor losses in the execution of the contract, when every practical man knows that losses and delays are as a rule encountered in almost every contract like this. Hence I have concluded to take 30 per cent from the theoretical profits which the plaintiffs’ proofs show they would have made by executing this contract for the performance of such work.”

In *United States v. Speed*, 8 Wallace (75 U. S.) 77, the plaintiff agreed to pack for the U. S. Government 50,000 hogs, which were to be furnished, together with materials for packing, by the government. The government after furnishing some 16,000 hogs refused to furnish the remainder, al-

though the plaintiff was ready to pack the same. Justice Miller, delivering the opinion of the court, said:

“And we do not believe that any safer rule, or one nearer to that supported by the general current of authorities, can be found than that adopted by the court, to wit: the difference between the cost of doing the work and what claimants were to receive for it, making a reasonable deduction for the less time engaged, and for release from the care, trouble, risk and responsibility attending a full execution of the contract.”

Sullivan et al. v. McMillan et al., 26 Fla. 543 (8 So. 450), was an action originally brought by McMillan and Wiggins to recover damages for the breach of contract in and by which plaintiffs agreed to cut and deliver logs of specified dimensions. One of the questions involved in the case was the cost of delivering a large number of logs at the rate of 100 logs per day requiring deliveries extending over a period of two years. Referring to this question and speaking of the testimony of one of the plaintiffs as to what it would have cost to deliver the logs in question, the court said (8 So. 463):

“The absence from his statement of the number of teams it would have been necessary to keep on hand and employ to ensure their delivery of so many logs daily during so long a period is to our minds strong evidence in itself that he did not understand that he was speaking of such a proposition; but whether he did or not so understand we do not think his testimony was sufficient to justify a ver-

dict upon the basis of the delivery of 100 or any other number per day; for when he proceeds to itemize the expenses of delivering, *he omits certain elements of expense which, in view of the items he mentions, suggests themselves, and independent of which no verdict approximating justice can be rendered.* Had the contract been performed in full the value of the use of the teams required for performance would have been an element of expense. When he ceased to perform, his expense ceased; his teams then became free to be used in any other venture, and were no longer employed in this; or, if he had been hiring them from other persons, the cost of their use would have ceased. It cannot be that the plaintiffs are to be better off than they would have been if they had performed the contract; yet if the value of the use of, or the cost of hiring, the oxen which would have been employed in the performance of the contract is not included as an expense, it is certain that less expense is estimated, and consequently greater profit allowed, than would have been in case of actual performance. This item of expense, and we do not say there are not others of the same kind, is necessarily shown by the fact that teams are proved to have been used in the performance of the contract. It is of course to be distinguished from any item of expense which those given do not suggest as necessarily attending the performance of the contract. It is a patent defect in the testimony of the witness and destroys it as the basis of a just or legal verdict, whatever the number of logs to be delivered daily was."

In the case of *Masterson v. Mayor*, 7 Hill 61; 42 A. D. 38, at page 45, the court said:

"It is a very easy matter to figure out large profits upon paper; but as will be found, these,

in a great majority of cases, become seriously reduced when subjected to the contingencies and hazards incident to actual performance. A jury should scrutinize with care and watchfulness any speculative or conjectural account of the cost of furnishing the article, that would result in a very unequal bargain between the parties, by which the gains and benefits, or, in other words, the measures of damages against the defendants, are unreasonably enhanced. They should not overlook the risks and contingencies which are almost inseparable from the execution of contracts like the one in question, and which increase the expense independently of the outlays in labor and capital."

Another qualification to the general rule first above stated is expressed in the case of *United States v. Behan*, 110 U. S. 338. The facts of that case were as follows:

One Roy and the United States entered into a contract to improve the harbor of New Orleans, and later, upon the contract with Roy being annulled, the surety on Roy's bond was authorized to fulfill the contract. He went to expense in providing machinery and materials and did a portion of the work when the government finally cancelled the contract. The claimant thereupon sold the materials on hand. The Court of Claims allowed him for his actual expenditures in the prosecution of the work, together with the unavoidable losses on materials. The government appealed on the ground that by making a claim for profits the claimant asserted the existence of the contract and could only recover nominal damages if

he was unable to show that profits would have been made. The Supreme Court, however, speaking by Justice Bradley, in affirming the decision of the Court of Claims, said:

“The *prima facie* measure of damages for the breach of the contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damages, namely: *first, what he has already expended toward performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract.* The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when in the language of Chief Justice Nelson, in the case of *Masterson v. Mayor of Brooklyn*, they are the ‘direct and immediate fruits of the contract,’ they are free from this objection; they are then ‘part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the enjoyment of any other stipulation.’ Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such a remote and speculative character that they cannot be legally proved, the party is confined to his actual outlay and expense. This loss, however, he is clearly entitled to recover in all cases, unless the other party who has voluntarily stopped the performance of the contract, can show to the contrary.”

In connection with the general rule and its modifications hereinbefore stated we must remember that where the evidence shows actual damage, but fails to show with reasonable certainty the extent of such damage, plaintiff is entitled to nominal damages only.

See

R. R. Co. v. Town of Cicero, 157 Ill. 48; 41 N. E. 640;

Hudson v. Archer, 9 S. D. 240; 68 N. W. 541.

The principles of law announced above were covered by the instructions proposed by the plaintiff in error but which instructions the court refused to give to the jury. It instructed the jury on the general rule first above stated but ignored all the modifications of that rule which were peculiarly applicable to the facts of the case at bar.

The evidence clearly brought this case within the modifications of the rule above stated, but no instructions covering these modifications were given. It appears that the drawings were never completed and that delays would ensue awaiting their completion. All these delays in performance militated against the possible profit. This situation was indicated in the letter written by defendant in error to plaintiff in error on February 12th, 1907, nearly six weeks after beginning work. In that letter the president of defendant in error stated:

“ * * * there seems to be a considerable portion of the structure, the form and design

of which is yet unsettled. The architect may have all this clear in his mind, but has not made it clear to us through his representative, Mr. Smedberg, whom we understand has written several times for added information.

“It seems that Mr. Smedberg cannot be working in perfect harmony, for in being sent on such a mission as he is apparently sent here, he should be able to furnish us with such information and data regarding the structure, in advance of our work, so that we would not be handicapped and delayed as we have been thus far in the preparation of the detail drawings.

“We have not complete information as to how the steel frame should be built in its entirety. If we had this, we could make rapid progress. We can only depend on Mr. Smedberg and he undoubtedly had no knowledge of the requirements. He has approved three detail drawings thus far and we judge that there will be from 75 to 80 drawings on the building. We cannot go ahead as fast as we would like and complete as we go because of the information which is lacking. When we fabricate the steel for this building, we want to do it in some kind of rotation and the drawing work will be at a standstill, and we will be obliged to suspend work unless we are given the requirements to go ahead with. Had we known that Mr. Smedberg would not be in possession of all the information when he arrived here (which was the understanding between your Co. and the writer when in San Fran.), we would never have signed the contract, or begun any work until we knew that this information was all available, as it would only repeat a hundred unpleasant experiences. It is just dragging the whole matter into a muddle and the boys who are working on it

have already lost heart. Therefore please give us an order to suspend work until we know what to do, or in some way tell us what is wanted in this building.

“We put up a 3,000 ton job last summer in 93 days from the time we got the contract and it was only because all concerned knew what they wanted. This job of about 1,200 tons is going to drag for months at this rate and we will have to put other work in its place if we do not get a complete starting point at once” (Tr. pp. 223-224). See also Defendant’s Exhibit “F” (Tr. p. 226).

Even the specifications made the performance of the alleged contract most onerous (Tr. p. 108).

There is no evidence allowing for time that would have been expended in carrying out the contract, nor is there any evidence of the saving resulting to the defendant in error by non-use of equipment and machinery.

As was substantially said in the leading case of *Masterson v. The Mayor etc.* (supra), it is one thing to figure profits on paper in advance of the performance of the contract and quite a different matter to perform the contract at the profits so figured.

Measured by the principles fixed by the above decisions, as applied to the evidence in this case, the trial court erred grievously in refusing instructions one (1) and two (2) proposed by the plaintiff in error. These instructions directed the jury to return a verdict for the plaintiff in error because:

1. The alleged contract was void;

2. There was no evidence showing either the *quantity of steel* to be delivered pursuant to the alleged contract nor the *cost* to the defendant in error for the full performance of said alleged contract.

These instructions presented basic propositions of law that had been repeatedly discussed in several demurrers before the trial court and also many times during the trial on objections to the introduction of evidence. *They go to the very fundamentals of the case. If there is no contract there is nothing to sustain the alleged cause of action.* If it be conceded for the sake of argument that the contract is valid, but that there is a failure of evidence in the number of tons of steel required by such contract, *then no damage was sustained by its breach* which can be recovered. By both instructions questions were presented that ran through the whole case from its beginning and the various rulings by the trial court on these questions at the successive stages of the case in that court constitute such "*plain errors*" that this court would notice them *even if they had not been assigned or specified.*

1.

The contract was void. This has been fully discussed in the preceding division of this brief, and need not be argued here.

2.

Neither by the alleged contract, nor by any paper exhibit nor any other document referred to therein, nor by any evidence in connection with such contract, *was there any showing made of the amount of steel to be delivered, pursuant to the terms of the alleged contract.* And, as a necessary consequence, there was not and could not have been any evidence or showing of *cost* to the defendant in error (Modern Steel Structural Company), of *the full performance of said alleged contract.*

The court instructed the jury that the contract *was valid*, "as alleged". This meant, according to the complaint, a contract for fifteen hundred tons. The court added that the contract *had been violated* by plaintiff in error and that the only question to be considered was the *amount of damages.* The counsel for plaintiff in error conceded, during the trial, as they do now, *that in an appropriate action, viz: for goods sold and delivered, the defendant in error would be entitled to a verdict for \$3021.09, the cost of the steel delivered,* but not as damages for breach of contract. Unless this action can be considered as an action for goods sold and delivered, there should be *no judgment* for the defendant in error, even though plaintiff in error might *in a proper action* concede that judgment for the cost of the steel delivered should be awarded in favor of defendant in error.

The present action is for breach of contract. We contend that the evidence fatally fails to sustain the claim for damage.

The rule of law without the modifications applicable to this case, as admitted by all the authorities, is that the defendant in error should recover

“the difference between the cost of doing the work and what claimant (defendant in error) was to receive for it, making a reasonable deduction for the less time employed and for release from the care, trouble, risk and responsibility attending full execution.”

U. S. v. Speed, supra,

and these elements must be sustained by *“that clear and direct proof which the law requires”*.

U. S. v. Behan, 110 U. S. 338.

Therefore, defendant in error was required to prove two essential facts:

- (a) The cost of doing the work;
- (b) The amount it was to receive for the work.

Both these elements depended absolutely on the quantity of *steel to be furnished*. The price per ton to be paid by plaintiff in error was fixed by *the proposal at \$77 per ton*, but the proposal was silent on the *number of tons to be delivered*. Unless the number of tons can be ascertained, there is no way of determining either the *“cost”* of doing the work, or the *“amount”* defendant in error was to receive for performing the alleged contract. Without *“clear and direct proof”* of these ele-

ments, no judgment for defendant in error can be sustained.

To meet the demands of this rule of law, defendant in error claimed that the evidence showed that fifteen hundred (1500) tons of steel were required by the terms of the alleged contract. There is no record that any amount was to be delivered and the only evidence to sustain the claim is the testimony of *three witnesses* for defendant in error, viz.:

S. B. Harding, president of the defendant in error;

F. W. Harding, vice president of defendant in error;

Frederick W. Hoffman, an employee of defendant in error.

To show the *absolute want of any evidence on the question of the quantity of steel*, we quote from *their testimony*:

S. B. Harding said "about fifteen hundred tons", would be required because Mr. Vigus "talked of 1400 tons; the architect and his engineer talked of 14 or 1500 tons, as I remember it." The architect's plans were incomplete and in examining the plans, I found many discrepancies and from such investigation and discrepancies found, *think* that building would run up to 1500 tons, if not more (Tr. p. 130, p. 131).

Mr. S. B. Harding's opinion changed with a rapidity that is convincing proof of the unrelia-

bility of this character of testimony, for in two letters to the plaintiff in error written in February, 1907, he stated "about 1200 tons" would be required (Tr. pp. 224, also 227).

Frederick Hoffman, an employee of defendant in error, testified (Tr. pp. 176-178):

"To a certain extent I am familiar with the plans and specifications for the Columbia Theatre job at San Francisco, which came into the shop of the plaintiff early in January, 1907. At that time I knew, from the plans and specifications, the length, width and height of the building, and generally in regard to its dimensions. I had nothing to do with the making of the detail drawings.

Q. From your examination of the drawings and specifications of the building, in your judgment, what quantity of structural steel was required to carry out the plans and specifications for the Columbia Theatre Building in question?

A. In my judgment, it would take in the neighborhood of 1500 tons.

The WITNESS (continuing). That would be a fair estimate; I arrived at approximately 1500 tons of structural steel by my past experience, considering buildings of similar construction and size, and considering the plans and specifications and the city ordinances of San Francisco, covering such buildings at that time. I had before me the city ordinances and specifications. I have no interest in this litigation."

On cross-examination he testified:

"I did not take off the quantities from the plans of the Columbia Theatre building. I said it would take 1500 tons of steel because I just

estimated that on past experience with other buildings and passed my judgment on the specifications and what they called for. It was only an estimate."

F. W. Harding, vice-president of the defendant in error, testified (direct examination):

" * * * I can state very approximately that at least 1500 tons of steel would have been required to construct that building. * * * *Although it never became part of my duty to remember quantities, but I was required to place valuations on work. The estimating of quantities would be done by our clerical force*" (Tr. p. 182).

On cross-examination he testified:

"I estimated that 1500 tons of steel would be required for the building, but I could not take the quantities to determine that. I had to take the cubic-foot rule, because the general drawings were not completed for the entire building, but we knew the size of the building" (Tr. p. 201).

This is the only suggestion of testimony in the record to prove the quantity of steel that was required to be furnished under the alleged contract. This is all there is on the subject, yet the court instructed the jury that the contract as alleged was proved. The alleged contract was *pleaded in legal effect* and it was alleged that it was a contract to furnish 1500 tons of steel (Tr. p. 44). Where is there any evidence of such a contract? Where is there any support for the court's instruction?

There is no testimony on the amount of steel to be furnished.

S. B. Harding expresses his opinion of 1500 tons because some one "talked about" that amount.

Frederick Hoffman, on cross-examination, knew nothing. He simply "estimated"—the better word would be "guessed".

F. W. Harding admitted he knew nothing about taking quantities, but stated "very approximately that at least 1500 tons". It was not a part of his business to remember quantities but he remembers this amount (Tr. p. 182). *The only people who did the estimating of quantities for the defendant in error*—members of its clerical force (Tr. p. 182)—were not called to testify. Why not? The testimony of witnesses S. B. Harding, Frederick Hoffman and H. A. Sell was taken at the plant of defendant in error where all its clerks were and *while they were present*. Why were they not invited to testify? *Because they would have been compelled to answer that there was no means of determining the number of tons*. They would have testified with witness Breite (Tr. pp. 234-235) that before the number of tons of steel for any particular big building may be determined, there must be a complete design showing each steel member that enters into the building and that without the complete design it is not possible to determine the tonnage. Without that complete design it is impossible to tell the number of tons because there

is no way of knowing the size or shape of the steel beams, girders, columns, trusses or cantilevers. Every architect has his own idea of beauty. Every architect determines for himself whether he will adopt the more expensive truss construction or adopt the column plan of construction. He may prefer heavy or light construction. He may build for today, or so design the contemplated structure that it will carry extra stories. But until the design and drawings are completed no one can determine these elements. Even the architect does not know until he is advised of the amount the owner is willing to spend. The drawings showed the space the theatre would occupy but without any size, or figures or dimensions on it from which one could draw any conclusion whatsoever.

All the witnesses agreed that it would not be possible to "cube" such a building because the engineer or the man trying to "cube" the building cannot put himself in touch with the architect's idea or his plan of construction. The architect may design some very elaborate architectural features that require much more steel than other features, and until the design is completed it would be impossible for a man to cube up a theatre building, or a hall, or a church or a large auditorium or building of any such character. And agreed with witness Galloway (Tr. p. 248) that the method of ascertaining the weight of steel in a building of this character by "cubing it" is

regarded merely as a general method and is in no sense of the term accurate; that on account of the complications entering into a theatre building and design of a theatre building, it is impossible to tell the total weight of structural steel in such a building without knowing the design; that the only way to determine the weight of steel for such a building would be to have plans prepared and estimates made, piece by piece.

F. W. Harding, the vice-president of the defendant in error, when he was not thinking of the necessity of establishing that 1500 tons of steel would be required to complete the building, testified as follows:

“We cannot tell how to fabricate the steel until we have the design from the architect; until *we have that design we don't know what the members are going to consist of absolutely.* If we were engineers we could, otherwise we cannot use our own judgment in a matter of that kind. We have to wait for the architect” (Tr. p. 225).

If, until they have the design from the architect they could not tell of what the *members consisted* how could they tell the weight of “steel members” they did not know? Who is to say how long or how short, how heavy or how light, how thick or how thin they may be designed.

This is not a case where there is any conflict in the testimony. It is a case where there is al-

most perfect agreement among the witnesses on material facts. All agree that there was no *meeting of minds* on an *essential element of the alleged contract*—the drawings that were never completed. All agree there was no *meeting of minds* on the drawings and designs for the theatre portion (this constituted more than one-half of the combined office and theatre building) and on the amount of steel to be furnished. These essential elements were “*to be furnished*” but were never furnished. The result is there is no contract and no way to determine the cost of performing it to the defendant in error or the price to be paid on performance by plaintiff in error. Both parties took chances on the ultimate completion of the contract. It was never completed, and the law declares there is no contract and consequently there can be no action on the alleged contract.

The witnesses even agree that the number of tons of steel in a proposed building where there are no complete drawings cannot be determined by “cubing” and that it is absolutely impossible to determine the number of tons until the design is known, if the proposed building is a church, theatre or auditorium, or any building where there must be great spans and considerable truss work. *This is the testimony of John D. Galloway, structural steel engineer, and it was not disputed by any of the witnesses for the defendant in error* (Tr. p. 248). W. Breite corroborated him (Tr. p. 235).

This testimony shows there could be no evidence of either:

(a) The cost to defendant in error of doing the work.

(b) The amount defendant in error was to receive on the completion of the alleged contract, because:

There was no way of knowing the quantity of steel required to be furnished.

Even if we assume the amount of steel "to be furnished" could be determined, there is no evidence of its cost to defendant in error.

The officers of the defendant in error should be better informed than any one else of "its cost" of doing the proposed work. Unless they knew this cost and gave evidence of it, the jury's verdict rests on *speculation and conjecture*.

It is apparent there was no less "speculation and conjecture" with the officers of the defendant in error than with the jury.

On the 25th day of January, 1907, the president of the defendant in error wrote:

"Now, if you can buy this job *one cent cheaper anywhere* we will be very much pleased to relieve you from the obligation to us" (Tr. p. 188).

Evidently, then, he did not think there was \$30,000 profits in the alleged contract. Nor did

he believe there was this fortune in a contract for about \$115,500, the amount he fixes as the total contract price, when, on January 31, 1907, he wrote:

“He admitted that he did, and the writer said to him that we regretted that there was any misunderstanding between yourself and the writer as we felt in the whole transaction *that we were more carrying out the obligation made by G. W. Harding of Los Angeles than anything else as we were so filled up with work, and the writer further said that we would be pleased if we could sublet it to some one and get out even and at the same time serve you, but if we could not we were going to stick by and fill the order” (Tr. p. 196).*

But a little over two months later this immense profit unexpectedly appears.

The bankruptcy of the Richelieu Realty Syndicate prevented the completion of the contract. The “inexperience” and “unfamiliarity” (these are the words of the president of defendant in error) of plaintiff in error with the overnight growth of profits in, and the method of, the steel business prompted it to wire the true conditions to defendant in error and ask it to telegraph its lowest figures in settlement of the matter. Probably defendant in error’s knowledge of this “inexperience” and “unfamiliarity” of plaintiff in error furnished its answer. It asked \$30,230 (Tr. p. 138). It was asked for an itemized statement of its claim and defendant in error itemized it as follows:

Material as per accompanying 4 sheets—weight—275481 lbs. at \$1.90 unloaded in our yard	\$5234.14
Car of steel invoiced	3021.09
<i>Expenses and advanced J. D. Smedberg</i>	350.00
Shop drawings	1441.53
Unused shop space lying idle	20183.24
Total	<hr/> \$30230.00

(Tr. p. 149).

Included in this figure is the item "Expenses and advanced J. D. Smedberg \$350". This "loan" is another item of profit that probably is charged to "inexperience" and "unfamiliarity".

The attorneys for the plaintiff in error were dissatisfied with this so-called itemized statement and wrote defendant in error for additional information. It replied under date of October 15, 1907, that the former figures were made up "somewhat hurriedly" and then fixed the damages at \$30,931.23 (Tr. p. 211). This estimate of its damage by the alleged breach covers three pages of the transcript of record (Tr. pp. 217, 218, 219) and includes in addition to the actual cost, "overhead expenses", namely a percentage of the costs added to the cost and estimated as the general expenses of doing business. The trial court refused to allow the plaintiff in error to show these "costs", holding they were not part of the cost of the contract.

The next estimate of the damage is given in its original complaint and the sum demanded is again changed to \$30,881.23 (Tr. p. 10).

The first amended complaint asks the same sum, but the second amended complaint fixes the damage at \$35,164.17 (Tr. p. 47).

The president differed from all these in fixing the cost of doing the work under the alleged contract as he fixed the damages at \$34,470 (Tr. p. 156) while the vice-president differed from the president and all others and fixed it at \$29,637 (Tr. p. 186).

There must have been at least *six different estimates of the "cost"* to defendant in error of doing the work under the alleged contract as the contract price was fixed in all these estimates at \$115,500. The law requires this element of "cost" to be established with certainty. How can there be any certainty when the men who were to do the work are unable to agree on its cost?

It is worthy of notice that all these estimates seem to fix the damages at about \$30,000. Whether the item of "overhead expenses" *is included or not*, the damages are fixed at about \$30,000.

By letter written on the 15th day of October, 1907, the total damage by the alleged breach is fixed at \$30,230 (Tr. p. 219). In this total sum the item of "overhead expenses" is charged to the cost of this contract. This item of "overhead expenses" properly chargeable to this contract is fixed at \$7171.23 (Tr. p. 164).

The testimony at the trial did not include the "overhead expenses" as part of the cost and the

damage therefore should be \$7171.23 greater than \$30,230, but F. W. Harding fixes it at \$29,637 (Tr. p. 186). Could there be more speculation, conjecture or uncertainty than that with which the witnesses for, and officers of the defendant in error, clothed the element of cost?

By the testimony of S. B. Harding, president of the defendant in error, the damages are fixed at \$34,470 (Tr. p. 156). In his estimate of the cost for doing the work he does not include any part of the "overhead expenses" and yet he admitted that properly such "overhead expenses" should be distributed proportionately over all contracts. S. B. Harding testified (Tr. p. 169) as follows:

"Q. Your overhead expense, as I understand it, is for the general management of the business of the Modern Steel Structural Company, applying to all contracts and all work being done by that company?

A. Yes, divided proportionally."

By this testimony, the damages claimed by the defendant in error *without allowing any portion of the overhead expense* as part of its cost were fixed at \$34,470 (Tr. p. 156); the damages fixed by Mr. Simpson, the secretary of the Company, in his letter of October 15, 1907, and in which he allowed as part of the cost of doing the work a proportion of the overhead expense, were \$30,931.23 (Tr. pp. 211-222). The more we read the more uncertain the situation becomes.

It is admitted that the "overhead expense" of the defendant in error during the time the contract in

question was being fulfilled by it, amounted to \$86,055.76 annually, or \$7171.23 per month (Tr. p. 164), and that one-third of the plant of defendant in error for a period of from sixty to ninety days (in the absence of delay) would be used in completing the contract in question (Tr. p. 171). Hence the overhead expense that should be charged against this work would be at *least* \$7171.23. Despite the testimony of S. B. Harding, the lower court prevented the "overhead expense" being considered as part of the cost of the work notwithstanding he testified that every item of "overhead expense" bore on the cost of doing this work (Tr. pp 163-164).

THAT NO DAMAGES WERE SUSTAINED IS ALSO APPARENT FROM THE FACT THAT THE EVIDENCE SHOWS WITHOUT CONFLICT THAT DEFENDANT IN ERROR WOULD NOT HAVE MADE ANY PROFIT—BUT WOULD HAVE LOST MONEY—IF THE CONTRACT HAD BEEN PERFORMED.

We shall demonstrate by the testimony of the witnesses of defendant in error that it would not have made a profit—but would have lost money if the contract had been performed, and that the attempt to procure profits was an effort to coin the misfortunes of plaintiff in error into false profits for the defendant in error.

In this demonstration we shall rely on the records and the testimony offered by the defendant in error.

During the taking of the first deposition of S. B. Harding at Waukesha, afterward superseded by the deposition received in evidence at the trial, plaintiff in error obtained a copy of *the cost sheet* of the work performed under the alleged contract in this suit. This deposition was taken more than *two years before the trial*. The fact that plaintiff in error had a copy of this record was forgotten until it was produced in court during the cross-examination of witness F. W. Harding at the close of the case of defendant in error. Its real effect will be more clearly apparent now. This "*cost sheet*" in connection with the testimony of witnesses for defendant in error proves to a mathematical certainty that the work under this contract could not have been finished at a profit.

In cases of this kind it is usually most difficult to meet the claim for damages. The claimant asserts that its cost for doing the work would be a certain figure, which cannot be disputed except by its own books which are often in such form as to add to the general confusion. If you prove the cost to another firm for doing the work the claimant usually answers that his methods, *or something else*, reduces the cost. Here by a chance of kind fortune, we are able to overcome by the records and sworn testimony of the claimant any such unwarranted claim.

The cost sheet of the Modern Steel Structural Company (defendant in error) for the contract in question is printed in the record (Tr. p. 205) but through the inadvertence of the printer it is headed

“Ledger Sheet American-Pacific Construction Company”. This error was corrected at the oral argument, and the cost sheet now appears as that of the Modern Steel Structural Company.

In this “cost sheet” are included all the cost incurred by the Modern Steel Structural Company (defendant in error) in performing the alleged contract.

“I hand you this (referring to above cost sheet) and ask you if that is not a copy of the detailed cost sheet of your work for the 39¼ tons?

A. No, sir; *I should say not. It includes all the work done on this contract up to a certain date. It includes some draughting, office labor and shop labor and freight charges not solely relating to the 39¼ tons.*

There is nothing that I see that sets out the work but I know by our general methods of cost keeping that the records of all the work of every nature on the contract would go into the office and naturally this would be the record of this contract and all that we did up to that date.”

“Q. Is that a copy of your ledger showing the work done, the drawing labor, the fabrication, or rather, the shop cost?

A. It seems to be.

Q. Is there any question about that being a copy of the page from your ledger?

A. No, there is no question.

Q. And the page of the ledger that refers to this contract, the contract with the American-Pacific Construction Company?

A. Yes.

Q. When you receive a contract you give it a number?

A. Yes.

Q. What is the number of the American-Pacific contract?

A. 561.

Q. That is a record of the work done under that contract?

A. Yes."

(Cross-examination F. W. Harding, Tr. p. 203.)

"Q. Do you know whether or not that ledger account was closed and when it was closed?

A. Closed, and possibly shown right here. I should say after that part of the work was performed (referring to entry on exhibit 'B'). We have not entered on that account there what the American-Pacific Construction owes us.

Q. You mean for future profits that you would have earned if that contract was carried out?

A. We are carrying such an account on our books.

Q. Which account includes what you estimate would be your profit? That account was closed when this litigation began by the notation on it 'in litigation'?

A. This account was closed.

Q. In so far as entries being made upon it?

A. Yes.

Q. And entries were made upon that account up to the time this litigation began?

A. Of this nature."

(Recross examination of F. W. Harding, Tr. p. 230.)

"Redirect Examination.

Mr. TAYLOR. Q. *Mr. Harding, the sheet that you have presented here presents the actual items you have paid out as costs. Is that correct?*

A. Yes.

Q. And does not embrace the damages by reason of the breach of contract?

A. No, sir.

Q. There is nothing stated in that about a breach of contract?

A. No, sir."

(Redirect examination of F. W. Harding, Tr. p. 231.)

Hence this sheet represents the actual cost to defendant in error of all work done by it under the contract in question.

What was the work done under this alleged contract?

"No steel was fabricated other than the 391¼ tons shipped to the plaintiff in error."

See cross-examination F. W. Harding (Tr. bottom of p. 230 and p. 231).

Consequently, we seek to know the cost of the work that did not relate solely to said 391¼ tons. The answer is in the record: "It includes some draughting, office and shop labor and freight charges not solely relating to the 391¼ tons" (Tr. p. 203). To obtain the cost of the 391¼ tons we must deduct the other items of cost.

The "cost sheet" shows that the entire freight and cartage included therein is \$9.73 (Tr. p. 205) and Mr. S. B. Harding, president of defendant in error, contradicts Mr. F. W. Harding as he testified the charge of \$9.73 was for cartage on the 391¼ tons (Tr. p. 160). However we shall accept the version

most favorable to defendant in error and omit it from the cost of $391\frac{1}{4}$ tons. The only other work done under the contract was the preparation of some templates.

“Q. It is also a fact, is it not, that the only work that you did under this contract was the fabrication of $391\frac{1}{4}$ tons of steel?

A. Yes; and the preparation of some templates, etc., for the plans.

Q. Then, I understand that the entire work that has been done by the Modern Steel Structural Company under this contract consist of the fabrication of $391\frac{1}{4}$ tons of steel, which you delivered to the American-Pacific Construction Company at San Francisco, California, the preparation of drawings for the $391\frac{1}{4}$ tons of steel which have been delivered and for work that you expected to do and the preparation of templates for the work that was delivered and for future work?

A. Yes, and the ordering of steel.

Q. Now, is there any cost to the ordering of steel?

A. We do that with our office force under the head of ‘overhead expenses’ ” (Tr. p. 162).

The insignificance of the cost of templates is apparent from the testimony of F. W. Harding (Tr. p. 183; p. 185).

Only drawings for 256 tons of steel were prepared (Tr. p. 237) and templates could not be made for more tonnage than there were drawings finished (Tr. p. 183) and the templates for the difference in tonnage between 256 tons and 1500 tons or 1238 tons would cost only \$32 (Tr. p. 185) and the labor would be inconsiderable. Only $161\frac{1}{4}$ tons of steel were delivered from the rolling mills to the works of defendant (Tr. p. 167).

Two facts established beyond all question are:

1st. Thirty-nine and one-quarter tons of steel for office building were fabricated and delivered.

2nd. Drawings were finished for 256 tons and no more.

Testimony of F. W. Harding, Tr. p. 201; p. 183; p. 206.

Testimony of W. M. Breite, Tr. p. 237.

Testimony of P. Zucco, Tr. p. 241.

This is not disputed.

On the basis of 1200 tons, this would be, according done. In point of tonnage it was one-fifth, but in point of drawings or drawing work it was one-tenth.

Tr. p. 237.

to Mr. Breite, one tenth of all the drawings to be

This is likewise not disputed.

By the "*cost sheet*" this drawing labor (without overhead) is shown to have cost \$669.28 for one tenth of the work. The whole would have cost on that basis \$6,692.80.

By the same cost sheet, the shop labor for $39\frac{1}{4}$ tons is \$328.64 (without overhead), or \$8.37 per ton, which is about the price all the experts agree the shop labor is worth.

But Mr. F. W. Harding says there was other shop labor included in those figures. What could it have been?

S. B. Harding's testimony is:

"Q. Then, I understand that the entire work that has been done by the Modern Steel Struc-

tural Company under this contract consists of the fabrication of $39\frac{1}{4}$ tons of steel, which you delivered to the American-Pacific Construction Company at San Francisco, California, the preparation of drawings for the $39\frac{1}{4}$ tons of steel which had been delivered, and for the work that you expected to do, and the preparation of templets for the work that was delivered and for future work?

A. Yes. And the ordering of steel.

Q. Now, is there any cost to the ordering of steel?

A. We do that with our office force under the head of overhead expenses" (Tr. p. 162).

F. W. Harding says:

"Mr. HUMPHREY. Q. Did you fabricate any work other than you shipped to us?

A. On this contract?

Q. Yes.

A. No, sir, I do not believe that we did fabricate any other" (Tr. p. 203).

Now, if they did not fabricate any but $39\frac{1}{4}$ tons, the other shop labor must be for the mere handling (not for the fabrication) of the difference between $161\frac{1}{4}$ tons and $39\frac{1}{4}$ tons, or 122 tons (Tr. p. 167).

For the 122 tons the cost of handling at 13 cents per ton (Tr. bottom page 159) would be \$15.86. Deducting this from \$328.64, the total cost of shop labor, we have \$312.78 as the "shop cost" of the $39\frac{1}{4}$ tons, save a small deduction for some templates that were made. This item is admittedly so small that it is immaterial. However, we shall deduct from our above showing of \$8.37 per ton for "shop labor cost", \$0.37 as a most liberal allowance per ton for labor in making templates.

Based on the figures shown by this "Cost Sheet", we are able to demonstrate the cost to defendant in error of purchasing, fabricating and delivering 1200 tons of steel (which amount we base on the letters of defendant in error of February 12, 1907 (Tr. pp. 224, 227), under the alleged contract:

DRAWING COSTS:

Breite and Zucco testified, without contradiction, that the drawings attached to the depositions on file showed only 256 tons of steel, and that this was but one-tenth of the total drawing work to be done. (Tr. pp. 237, 241.) On the "Cost Sheet" figures of \$669.28 for doing this one-tenth of the drawing work, the total drawing work would cost.....\$ 6,692.80
=====

SHOP COST.

The evidence and "Cost Sheet" show that the entire shop cost of $39\frac{1}{4}$ tons and the making of templates for additional work amounted to \$328.64, or \$8.37 per ton; and that the sum of \$.37 cents per ton was a most liberal allowance for the shop cost of templates, and therefore the shop cost per ton for all work other than templates, on the $39\frac{1}{4}$ tons, would be \$8.00.

(Note: Both the drawing cost and shop cost given above are figured in connection with the steel for the office portion of the building, as distinguished from the more expensive theater portion, the $39\frac{1}{4}$ tons referred to in the "Cost Sheet" being material for the store portion of the building.)

Assuming the office portion of the building to be at least 50 per cent. of the combined theater and office building—and all agree the office portion was less than 50 per cent. thereof—we have the following:

Shop Labor Cost for Office Portion:

600 tons @ \$8.00 per ton.....	4,800.00
--------------------------------	----------

The shop labor for the theater portion would cost at least 50 per cent more (Snyder, Breite, Zucco and Harding).

Hence, adding 50 per cent. to the cost of the shop labor of the office portions of said building, we have

Shop Labor Cost for Theater Portion:

600 tons @ \$12.00 per ton.....	7,200.00
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Total Shop Labor Cost.....	12,000.00
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Total Drawing Labor Cost.....	6,692.80
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Total Shop and Drawing Labor Cost	\$18,692.80
---	-------------

Cost of 1200 tons of steel @ \$38.00 per ton (Tr. p. 165).....	45,600.00
--	-----------

Freight on 1200 tons @ \$15.00 per ton (Tr. p. 165).....	18,000.00
--	-----------

Total.....(carried forward).....	\$82,292.80
----------------------------------	-------------

Brought forward.....\$82,292.80

But the above Drawing Cost is figured on the basis of the drawing cost for an office building, and it is admitted by all and testified to by Harding, Breite, Snyder and Galloway, that the drawing cost for the theater portion of the combined building would be at least \$4.10 per ton more than the drawing cost for the office portion.

Therefore we must add \$4.10 per ton for at least one-half of 1200 tons, or the sum of..... 2,460.00

Hence the *total cost* is.....\$84,752.80

=====

BUT

1200 tons @ \$77.00, the alleged contract price=.....\$92,400.00

Total cost of doing the work, as shown above=..... 84,752.80

Leaving, on the basis of the figures of defendant in error, without deduction for "overhead expenses"; freedom from risk and trouble attending full performance, less time required, etc., (referred to in *United States v. Speed*, and other cases, *supra*) an apparent profit of only.....\$ 7,642.20

And by the testimony of the president of defendant in error the "overhead expenses" properly chargeable to this risk amounted to.....\$ 7,171.23

Hence, without deduction for freedom from risk, trouble, (U. S. v. Speed, *supra*), etc., and only charging "overheads" the apparent profit, on the figures of defendant in error, cannot exceed.....\$ 475.97

The above computation, covering the entire 1200 tons of steel, necessarily assumes the payment of the 391 $\frac{1}{4}$ tons of steel fabricated by plaintiff, but does not charge against the "Cost" the cost of material for templates, of power, freedom from risk and trouble, and time saved, and other hazards and incidents that would naturally attend the performance of a contract so prematurely conceived and so haltingly undertaken as was the one here in question. If these last-mentioned items were considered, the apparent profit of \$475.97 would be changed into a large loss.

The figures of \$7171.23 is testified to be the monthly "overhead expenses" of defendant in error (Tr. p. 164). It is also testified that the alleged contract would require at least one-third of the plant of defendant in error for three months or the whole of the plant for one month. Hence the "overhead expenses" chargeable to this alleged contract is \$7171.23.

The figures showing the loss defendant in error would sustain in the performance of the alleged contract are no different than it expected when it wrote in the letters of January 25, 1907, and January 31, 1907, that it would be pleased if it could "get out even" (Tr. pp. 188, 189, 196).

III.

VARIANCE.

(a)

The complaint alleged a contract for the fabrication and delivery of an *agreed amount* of steel, to wit: 1500 tons (Tr. p. 44). There was no proof of any contract or agreement. A proposal, alleged specifications, opinions and "guesses" of the amount of steel that would be required for unfinished and probably unconceived drawings were received in evidence and all absolutely negative the idea of any agreement on the amount of tonnage.

(b)

The allegations were that the deliveries under the contract were to be made by September 1, 1907 (Tr. pp. 43-44).

There was no evidence offered of such a contract. On the contrary, the only evidence showed that deliveries were to be made:

"DELIVERY: As follows: That portion indicated by Mr. Smedberg shown within red lines on blue print, 3-S, 4-S, 7-S, dated by us on the back of print as received Dec. 31, and 8-S, dated by us on the back of print as received January 3, 1907, required to begin the erection of steel work on stores, to be shipped from our shop thirty days from our receipt of approved working detail drawings, signed by Mr. Smedberg. Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg from date of approval" (Tr. pp. 2-3).

This is a complete variance and sufficient to defeat the claim of defendant in error.

IV.

UNDER THE TERMS OF THIS PROPOSAL OR ALLEGED CONTRACT IT WAS NECESSARY FOR THE DEFENDANT IN ERROR TO SUBMIT TO ARBITRATION ITS CLAIM BEFORE INSTITUTING THIS ACTION.

The provision of the contract in this action is as follows:

“In case any difference of opinion shall arise between the parties to this contract, in relation to the contract or work to be, or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract and these two shall have the power to name an uninterested umpire, whose decision shall be binding on all the parties to the contract” (Tr. pp. 4, 5 and 193).

In *Holmes v. Richet*, 56 Cal. 312, the Supreme Court of that State said:

“By the terms of the contract, authority was given the architect to decide any dispute that might arise respecting the true construction and meaning of the drawings or specifications and upon all such questions his decision should be final; but upon the question of extra work, he was not authorized to decide. On the contrary, by the express terms of the contract, such disputes, were to be referred to two competent persons, and if they could not agree, the services of an umpire were to be invoked. Was it competent for the parties to make such a stipulation? It has been frequently decided, and now seems to be the settled law, that an agreement to refer a case to arbitration will not be regarded by the courts,

and they will take jurisdiction and determine a dispute between parties notwithstanding such an agreement. *But that is not this case.* Here the parties simply agreed that the amount or value of certain extra work should be fixed in a certain manner, and was there any right of action in this case for and on account of said extra work until the value thereof was fixed according to the terms and conditions of the contract? In other words, was it not a condition precedent to any right of action, that the value of the extra work should be determined in the mode provided by the contract? This question was very elaborately considered by the Court of Appeals of New York, in the recent case of *The President, etc. v. The Pennsylvania Coal Company*, 50 N. Y. 250. The Court there says: ‘The distinction between the two classes of cases is marked and well defined. In one case, the parties undertake by an independent covenant or agreement to provide for an adjustment and settlement of all disputes and difference by arbitration, to the exclusion of the Court; and in the other they merely by the same agreement which creates the liability and gives the right, qualified the right by providing that, before any right of action shall accrue, certain facts shall be determined, or amounts and values ascertained and this is made a condition precedent, either in terms or by necessary implication. This condition being lawful, the Courts have never hesitated to give full effect to it. * * *’

DISCUSSION OF “BRIEF FOR DEFENDANT IN ERROR”.

Defendant in error answers the arguments advanced for the reversal of the judgment entered in this action by insisting that the exceptions upon

which the errors are predicated were not properly assigned and that the charge of the court announced correct principles of law. It argues further that the plaintiff in error was estopped from contending that the evidence did not show that the defendant in error had been damaged by the alleged breach (assuming for the moment the alleged contract to be valid) because as defendant in error urges, the alleged unlawful act of plaintiff in error prevented the contract and drawings from being completed from which the exact tonnage to be fabricated could be determined. *This is indeed the announcement of a new principle*—the party breaking a contract may not insist upon the injured party proving his damage. The absurdity of this contention is quite apparent. But in the case at bar it was the Richelieu Realty Syndicate—not the plaintiff in error, that refused to complete the drawings and the contract. *It was the Richelieu Realty Syndicate, not plaintiff in error*, that employed and controlled the architect and engineer to prepare the drawings. Plaintiff in error was the *unfortunate middleman* and could not carry out its proposal with defendant in error because the *Richelieu Realty Syndicate* became bankrupt and was unable to, and refused to, have the drawings made or the building built. Its abandonment necessarily forced plaintiff in error to advise defendant in error to proceed no further with the work.

We shall reply to the various contentions of defendant in error in the following order:

1. All errors discussed in the brief of plaintiff in error are based upon "sufficient exceptions" and "assignments of errors".

2. The form of taking the exceptions is the basis of the objections of defendant in error. It does not contend that no exceptions were taken. We insist that even if *no exceptions were taken* that the propositions advanced for the reversal of the judgment were urged and discussed so repeatedly before and during the trial of the action and are so substantial and vital to the case that they became "plain errors" which this court will consider without exceptions or assignments of error.

3. The court's rulings and instructions on the vital questions involved in this action, viz: existence and validity of *the alleged contract and the proof of damages required* were glaringly erroneous.

4. Plaintiff in error was not estopped from requiring legal proof of the alleged damages.

I.

ALL ERRORS DISCUSSED IN THE BRIEF OF PLAINTIFF IN ERROR ARE BASED UPON SUFFICIENT EXCEPTIONS AND ASSIGNMENTS OF ERROR.

Plaintiff in error is not urging any error of a technical nature. It bases its demand for a reversal of the judgment on the most substantial grounds. It contends that the alleged contract is void, but even

if valid that there is no, and could be no, evidence of damages, and that there was a variance between the contract alleged and the one sought to be proved. There is also the additional proposition that the action is premature. All discussions revolve around these main propositions and the errors upon which these discussions are based were not only on "Instructions", but upon rulings on successive demurrers and on the admissibility of evidence.

The question of the validity of the alleged contract was raised when it was offered in evidence by the following exceptions:

- Exception No. 2, Tr. pp. 97-98-99;
- Exception No. 3, Tr. pp. 103-104;
- Exception No. 4, Tr. p. 105;
- Exception No. 5, Tr. p. 125;
- Exception No. 6, Tr. p. 128;
- Exception No. 7, Tr. pp. 130-131;
- Exception No. 10, Tr. pp. 231-232-233.

Refusal of the court to give instructions proposed by plaintiff in error (Tr. pp. 281-290).

The error made by the denial of the motion for non-suit (Tr. pp. 231-233) can be urged on appeal, as plaintiff in error at the end of the trial requested the court to instruct the jury to return a verdict for the defendant (Tr. pp. 280-281).

Errors based on the failure of proof of damages were based on proper exceptions and assignments.

See exceptions quoted under the first proposition.

Also

Exception No. 7, Tr. pp. 130-131;

Exception No. 8, Tr. p. 177;

Exception No. 9, Tr. p. 181.

In view of the foregoing and of the further fact that the requested instructions were numbered, and were as a rule brief and confined to single propositions of law, some of which were not contained in any form in the charge, others being clearly at variance with the charge, it is submitted that the exceptions in question were sufficiently specific to satisfy the rule requiring specific exceptions.

The questions presented by exceptions to various rulings on the admission of evidence, as we have seen, raise all the questions discussed in this brief. Defendant's Exception No. 7 (Tr. pp. 130-131) had reference to the overruling of defendant's objection to a question asked and the motion to strike from the record all of the answer of S. B. Harding except the word "Yes" in response to a suggestion that it would require to complete the building "1500 tons at least according to these specifications?"

After answering "Yes", the witness went on to say:

"and my reasons for that statement would be this: The American Pacific Construction Company, through Mr. Vigus, talked of 1400 tons; the architect and his engineer talked of 14 or 1500 tons, as I remember it. Now the architect's plans—I am speaking now of the original

plans from which we made our detail drawings—were incomplete at the time we began work, and Mr. Smedberg came up for the purpose of completing these drawings, and in so far as we went in examining the original drawings prepared by the architect, we found a number of places where they were not up to the ordinances, and that was the occasion of our writing our letter of March 26, marked ‘Exhibit O’ calling attention to the discrepancies, and I, therefore, from such investigations and discrepancies found, think, that the building would run up to the 1500 ton mark, if not more, as these increases spoken of are 20 per cent, or 25 per cent. Of course this would not apply to all the structure.”

In view of the fact that the action was on an express written contract, for a quantity of steel “estimated at fifteen hundred tons”, it would naturally be supposed that the contract sued upon would be examined for the purpose of determining, or affording a basis for determining, the important question of the quantity of material covered by it. Instead of this, however, the offered evidence was that the plaintiff in error, “through Mr. Vigus *talked* of 1400 tons; the architect and his engineer *talked* of 14 or 1500 tons”, etc. Even if mere oral remarks were otherwise admissible as evidence, still so far as the plaintiff in error is concerned, what the architect and his engineer, representing the Riche-lieu Realty Syndicate talked of, would of course not be binding upon plaintiff in error and in any event mere conversation would not indicate a final conclusion upon the question of quantity. But if the

talk referred to occurred before the contract was signed, then of course evidence of it would not be admissible, under the well known rule merging prior negotiations in the written contract. In this case, the contract pointed out a definite method for determining the character and quantity of the material. Therefore, any talk, *whether prior or subsequent* to the execution of the contract, would be inadmissible for the purpose of arriving at the matter of quantity by any other method than the contract method.

We do not think the language of the proposal raises any doubt upon the proposition that both parties understood that the matter of the character and quantity of the material proposed to be furnished was to be left open until agreed upon in the form of working detail drawings to be prepared, and to be approved by the consulting engineer Smedberg.

The questions thus presented by the exception we have been considering (Exception No. 7) brings us, by a side path, to the main conclusion for which plaintiff in error contended in the court below by its objections and exceptions to the admission of evidence, by its motion for a nonsuit, and by its exceptions to certain instructions requested and refused and to portions of the charge to the jury. We respectfully submit that, so far as concerns the main purpose of the action, as disclosed by

the pleadings and the evidence—namely, the recovery of damages in the way of prospective profits based upon a subject-matter that was never agreed upon by the parties—a plain and grievous error in point of law was committed by the trial court, preventing plaintiff in error from availing itself of the application to its case, *upon the evidence*, of well established principles of law.

2.

The form of taking the exceptions are the basis of the objections of the defendant in error. It does not contend that no exceptions were taken. We insist that even if no exceptions were taken that the propositions advanced for the reversal of the judgment were urged and discussed so repeatedly before and during the trial of the action and are so substantial and vital to the case that they become "plain errors" which this court will consider without exceptions or assignments of error.

"Plain errors" not assigned or specified may be noticed by this court.

See:

Rule 24 of Rules of the United States Circuit Court of Appeals.

As a general rule, exceptions to the whole of the charge of a court, or to its refusals to instruct, will not be considered by an appellate tribunal, still, having in view the reasons upon which the

rule is based and the manner and circumstances in which the exceptions here in question were taken and the character of the exceptions, we submit that the rule is not applicable here.

In *Price v. Pankhurst*, 53 Fed. 312, a case in which the reasons for the rule are adverted to at some length, it was said that among the purposes sought to be subserved by it are that the court may have an opportunity to correct or explain the parts of the charge excepted to, if it seems proper to do so, and that an opportunity may be afforded for explanations and qualifications that might otherwise be overlooked.

Where, however, as in the case at bar, the main contentions of a party are simple in their nature, are repeatedly indicated during the trial by objections and exceptions to the admission or rejection of evidence, by a motion for a nonsuit, and, either expressly or by clear intendment, in requested instructions, separately numbered, and where the rulings upon evidence and upon requested instructions, as well as the charge of the court, are manifestly inconsistent with such main contentions, and evince a clear, consistent purpose to negative or run counter to them—we contend that, the reason for the rule ceasing, the rule itself may not be invoked. The grounds for this contention we now proceed to discuss:

The legal questions raised by the exceptions taken by plaintiff in error during the trial are substantially embodied in the four main propositions urged in the

previous divisions of this brief. The various exceptions which involve and raise the main propositions referred to are covered by the assignments of error.

The first or principal one of these propositions is, in substance, that the proposal of defendant in error and its alleged acceptance by plaintiff in error did not constitute a contract, because the drawings, a material part of the contract, were never completed, and it contained a false reference, referring to specifications identified by certain marks and no such specifications are in evidence. This contention was expressly presented to the attention of the trial court, in various forms, at repeated intervals during the trial; first, by demurrers, then by objections and exceptions to the introduction of evidence which showed an inchoate and incomplete contract; later by a motion for a non-suit, and again by instructions requested by plaintiff in error and refused by the court, particularly requested instruction of plaintiff in error numbered 1, in which it was sought to have the jury instructed

“as a matter of law, that as the drawings which were a material part of the contract were never completed, the contract was void and therefore the verdict must be for defendant.”

It was also in substance reaffirmed by defendant's requested instructions numbered II and XIV (Tr. pp. 256, 260).

The second main contention was to the effect that, even assuming there was a valid contract, there was no proof of damage. The grounds of this contention, which is also obviously based on the incompleteness of the drawings and specifications were clearly brought to the attention of the trial court by the various exceptions presenting the first contention, as well as by defendants requested instruction II (Tr. p. 256).

The third main contention, to the effect that there was a variance, in certain specified particulars, between the contract alleged and the one sought to be proved, hinges on the first contention, and is clearly expressed and involved in the motion for a non-suit made by plaintiff in error (Tr. pp. 231-233) and in its requested instruction numbered II (Tr. p. 256).

The fourth main contention, to the effect that, even if the contract were valid, the action is premature, because defendant in error has never arbitrated the dispute involved in this action, as required by the arbitration clause in the contract alleged, which is a condition precedent to the right of action,—was presented by the motion for a non-suit.

The trial court was therefore fully advised as to the propositions of law which defendant urged and desired to have impressed upon the jury by the

instructions requested, but, having made up his mind as to the law of the case, did not care to have the objections of defendant elaborated.

This we think is clearly indicated in the opening paragraph of the court's charge, in which the court said:

“Ordinarily, I would not submit the case to you at his hour, but we are rather short of jurors on the panel, and I may need your services in another case in the morning. *It strikes me that this case is a very simple one, not only in its facts but in regard to the law, and I have an idea that you will be able to reach a verdict without difficulty and without remaining out over night, or any considerable period into the night.* My hesitation about submitting a case to the jury late in the day is that possibly they might get tied up and have to stay out all night. I know that is very unpleasant, but I do not apprehend any such result will follow in this case, so I will submit the case to you now” (Tr. p. 262).

And from the colloquy between the court and counsel for plaintiff in error, before the charge, it will be observed that while the language of the court suggested merely a doubt whether the method of excepting pursued by counsel was specific enough, it was apparent that the court knew the legal objections to the charge and no desire was expressed by the court for more specific exceptions to the refusals to instruct and to the charge of the court. For after expressing this doubt the jurors were in the same breath told by the court that they might retire (Tr. p. 268).

In this connection we quote from the opinion in *Price v. Pankhurst*, 53 Fed. 312, the following language of Circuit Judge Caldwell:

“It is of course the duty of the court to allow the parties reasonable time and facilities for specifying exceptions. There is no occasion for haste in charging a jury. No part of the trial should be conducted more deliberately and carefully, and no court will refuse a party time and opportunity to point out distinctly his exceptions to the charge before the case is given to the jury. He must be afforded opportunity to do this then, because he is precluded from doing it afterwards.”

We do not wish to be understood as intimating that the trial court, by its anxiety for an early decision, prevented counsel from pointing out, more formally and specifically, the portions of the court's charge to which exception was taken. But we desire to suggest that in view of all the circumstances above stated counsel for plaintiff in error believed and had reason to believe that the court did not desire to hear further from him on the subject.

As shown above, the second and third main contentions grow out of or are dependent upon the first main contention; for if the alleged contract was incomplete in the important and vital element of identified specifications and of drawings showing the character and quantity of steel to be fabricated and delivered, then there was not and could not be any proof of damage, as regards steel not

shown by drawings or specifications and hence not contracted for; and if the partial, incomplete drawings made in connection with the proposal showed a tonnage of very much less than the estimated amount of 1500 tons alleged by plaintiff to have been contracted for, and a different and uncertain time of performance than the contract alleged, then there was a manifest variance between the contract alleged and the one sought to be proved.

Therefore, in the light of the evidence, exceptions and rulings during the trial, the motion for a non-suit, and the instructions requested and refused, all of them obviously involving, in one way or another, the basic contention of law that the alleged contract shown in evidence was void,—a contention expressly negatived by the opening portion of the court's charge,—it is submitted that no useful purpose would have been served by exceptions more specific than those taken by plaintiff in error.

In *Central Trust Company v. Continental Trust Company*, (C. C. A.) 86 Fed. 517, it is said (p. 523):

“It is further objected that the specification of errors is too general and indefinite. The object of the rule in requiring the errors relied upon to be separately and particularly asserted is to enable the court to understand what questions it is called upon to decide, so it may not have to go beyond the assignment of errors itself to discover the blot, and also that the exceptor may be confined to the objections actually taken below. *Van Gunden v. Iron Co.*, 3 C. C. A. 294, 52 Fed. 840. Where various

errors are relied on, presenting different propositions, they should be separately and distinctly set forth; *but where the errors complained of present a single proposition of law, common to all of them, there can be no reasonable objection to assigning error to the group, as was done in this case.* Andrews v. Pipe Works, 22 C. C. A. 110, 76 Fed. 170, 171. The errors complained of in this assignment go solely to the action of the circuit court in overruling the exceptions to the complainant's answer, and to the final decree, whereby the court ruled that the unpaid interest which represented the rental of the tunnel track should be a lien upon the mortgaged property, to be paid in preference to the mortgage debts. In view of the fact that the court sustained all of the exceptions made to the answer, and the principle of law arising thereon is common to each portion of the answer ruled out, and to the decree as above stated, involving, in effect, but one question, the assignment of errors is reasonably specific."

But in any event we submit that the action of the trial court, as shown by the transcript of record in giving (in its rulings, instructions and refusals to instruct), legal effect as a valid, completed contract to an instrument manifestly inchoate and incomplete,—was of such a nature as to constitute a "plain error" within the meaning of the well-known rule of this court and of the United States Supreme Court, which permits the court, at its option, to notice a "plain error", not assigned or specified. And this plain error is the basis for three out of the four main contentions of our opening brief.

In *Columbia Heights Realty Co. v. Rudolph*, 217 U. S. 547, after referring to the statutory and other provisions governing federal courts, which require particularity in the specification of errors, the opinion proceeds to say:

“This court has, however, not regarded itself as under any absolute obligation to dismiss a writ of error or appeal because of the non-assignment of errors as required (by) Secs. 997 and 1012, Rev. Stat., having, by its rules, reserved the option to notice a plain error whether assigned or not. *Ackley School District v. Hall*, 106 U. S. 428; *Farrar v. Churchill*, 135 U. S. 609, 614; *United States v. Pena*, 175 U. S. 502.”

In *Weems v. United States*, 217 U. S. 349, the Supreme Court said (p. 362):

“It is admitted, as we have seen, that the questions presented by the third and fourth assignments of error were not made in the court below, but a consideration of them is invoked under rule 35, which provides that this court, ‘at its option, may notice a plain error not assigned.’

“It is objected on the other side that *Paraiso v. United States*, 207 U. S. 368, stands in the way. But the rule is not altogether controlled by precedent. It confers a discretion that may be exercised at any time, no matter what may have been done at some other time. It is true we declined to exercise it in *Paraiso v. United States*, but we exercised it in *Wiborg v. United States*, 163 U. S. 632, 658; *Clyatt v. United States*, 197 U. S. 207, 221, and *Crawford v. United States*, 212 U. S. 183. * * *

In the case at bar the “plain error” committed by the trial court in its rulings on evidence, its refusals

to instruct and its charge to the jury is clearly apparent on the face of the record. Upon the vital point as to the existence and scope of the contract the court charged the jury that the evidence showed "*without any conflict whatsoever, that the contract was duly executed between the parties AS ALLEGED*" (Tr. p. 263). The second amended complaint alleged that the quantity of structural steel and iron required for the Columbia Theatre Building "*was estimated at 1500 tons, and that by said contract plaintiff agreed to deliver all such material to defendant before September 1, 1907.*"

The court's announcement was therefore tantamount to an instruction that the parties had duly executed a contract calling for a quantity of steel estimated at 1500 tons. This statement however is absolutely without support in the evidence. As elsewhere shown, the proposal of plaintiff, introduced in evidence, proposed to furnish all the structural steel required for a building to be constructed in accordance with drawings and identified specifications to be furnished by Joseph D. Smedberg, which drawings were never made and the identified specifications are not in evidence. *Nothing whatever was said in said proposal about 1500 tons or any other number of tons.* The specifications in evidence were not the "*identified specifications*" and pointed to the drawings for information on the subject, reciting that they were "*intended to cover all the structural iron work for frame and reinforced concrete in said building*" and were "*intended to co-operate*

with the drawings for the same, both those furnished by the architect, and those furnished by the engineer, as hereinafter specified" (Tr. p. 108).

The uncertain and indefinite nature of a contract failing either to specify the amount of material required or to give any reference to existing drawings, specifications or other data by which the uncertainty could be changed to certainty, was recognized by the letter written by S. B. Harding on behalf of defendant in error, to plaintiff in error, dated December 27, 1906, in which it is said:

"You understand that we will have to make detail drawings and have them approved before we can make any start. * * *

Most of the difficulties in connection with all construction work of this nature is to get the matter of the drawings thoroughly understood and definitely outlined. *We then have a starting point*" (Tr. p. 86-87).

In the letter from defendant in error, by S. B. Harding, its president, dated February 12, 1907 (Tr. p. 224), it is said:

"This job of about 1200 tons is going to drag for months at this rate, and we will have to put other work in its place *if we do not get a complete starting point.*"

And defendant's Exhibit "G", being a portion of letter dated February 12, 1907, Modern Steel Structural Co. to American Pacific Construction Co., reads as follows:

"This theater job, we estimate from the plans, to weigh about 1200 tons, and it is only

a small matter to produce such a building, *if we could have a starting point*" (Tr. p. 227).

And, as will appear from the evidence, in April, 1907, when defendant notified plaintiff to stop all work on the Columbia Theatre job, and that the same would not be finished with structural steel, the parties were very little nearer the "starting point" than they were when the above letters were written (see testimony of S. B. Harding, Tr. pp. 162, 167; testimony of W. M. Breite, Tr. pp. 234, 237; testimony of Peter Zucco, Tr. p. 241).

Because of the above facts, therefore, there was no evidence to support the legal conclusion announced by the trial court to the jury, that "*the contract was duly executed between the parties as alleged.*"

In view of the allegations of the complaint and the evidence introduced over the objection and exception of defendant, the court's instruction could only lead the jury to believe that the amount of steel agreed upon by the parties was 1500 tons, the amount based on the allegations of the complaint and the "*guesses*" of defendant in error and its employees, without any reference whatever to the drawings which the proposal provided should show the material to be furnished. This belief of the jury's would naturally color all of the jury's estimate of damages, the only question which, the charge stated,

was before them for determination. This erroneous charge of the court's, aside from the error committed in failing to give instructions requested by defendant covering elements which, under the authorities shown in another part of this brief, should have been considered by the jury, was alone of such a controlling nature as necessarily to dominate the deliberations of the jury and vitiate any verdict it might render under the influence of the charge.

We therefore submit that even if the exceptions and specifications of error were not sufficient—and we believe we have shown that such is not the case—this court nevertheless *should*, in view of the “plain error” rule, consider the errors assigned.

3.

The court's rulings and instructions on the vital questions involved in this action, viz.: the existence and validity of the alleged contract and the proof of damages required, were glaringly erroneous.

It is contended by defendant in error that the charge of the trial court as to the measure of damages was correct. It is also urged, in substance, that as the evidence showed without contradiction the existence of the contract between plaintiff in error and defendant in error, as pleaded and a breach thereof by plaintiff in error, it was proper for the court to assume the existence of such contract and its breach, as alleged, and to charge the jury to that effect.

We submit that the latter of these contentions is fully answered by the argument and authorities, in the preceding pages, to the effect that, as the evidence showed that no completed contract was ever entered into between the parties, it was improper for the trial court to charge the jury "*that the contract was duly executed between the parties as alleged.*"

The contention that the charge of the trial court was correct is not supported by authorities involving elements of facts similar to those shown in the case at bar. The authorities cited in this brief demonstrate that the charge of the court, as applied to the evidence in this case, was insufficient, inadequate and incorrect, because of the omission from the charge of several important elements, necessary to be presented to the jury, and which were covered by the requested instructions.

It is now proposed to show that this insufficiency and inadequacy, either alone or in connection with the charge that the contract was duly executed as alleged by plaintiff, was of such a nature as to render it impossible for the jury to reach a determination, as to the amount of damages, that would have for its support a legal basis, or any basis other than guesswork.

In the portion of the charge which is quoted on page 34 of the brief for defendant in error, the court told the jury that the measure of damages was

“the difference between the agreed price per ton for the quantity of structural steel which you may find from the evidence would have been required to complete the contemplated building in its entirety as provided in the contract, less what you may find it would have cost the plaintiff to have completed the fabrication and delivery of such entire quantity of steel; in other words, the plaintiff is entitled to the agreed price per ton of the entire quantity of material covered by the contract to be furnished by it, less what it would have cost to deliver it free on board cars in San Francisco, with interest and so forth”.

No specific instruction was, however, given by the court as to the various elements of cost, or the offsets and allowances against estimated profits, which the jury should take into consideration in determining the amount of damages under the evidence in the case. The only instruction which the court gave to the jury upon these topics is covered by the following portions of the charge:

“The evidence on behalf of plaintiff should be such as to enable the jury to determine with reasonable certainty, first, what the probable expense or cost would have been to the plaintiff to have performed the contract in its entirety, this to be determined from the different elements of cost involved in the work as disclosed in the testimony; and secondly, the probable gross quantity of steel, in tons, it would have required to complete the building. Thereupon, by taking the total cost to plaintiff of fabricating and delivering the material, and deducting it from the gross sum produced by multiplying the number of tons of steel you find it would have taken to complete the build-

ing by the price per ton fixed in the contract, that is, \$77, the difference or result will be the profit which plaintiff would have made on the contract, and which would represent the damages which, under the law, it would be entitled to recover (Tr. pp. 265-6, Assignment 30).

“In figuring the cost to plaintiff of fabricating the steel in question, the fixed and regular monthly salaries paid by plaintiff to its permanent officers and heads of departments, without regard to this particular work, *should not be taken into account* unless you find that such item of general expense in plaintiff’s business would have been increased by reason of plaintiff having to carry out the entire contract but the jury should include in the items of cost such amount as they find would be a proper allowance for wear and tear on the machinery in plaintiff’s plant had the entire work contemplated by the contract been done at such plant (Tr. p. 266, Assignment 31).

“The evidence should be such as to enable you to determine the different elements which I have referred to as entering into the question of damages, with reasonable certainty; mathematical certainty is not required, but such degree of certainty as will enable the jury to reach approximately just results.”

The above instructions as to the measure of damages would have been sufficient, perhaps, as applied to a case involving elements less complex and uncertain than those shown in this case for instance, as applied to a case where the contract in question would be to furnish a definite, specified quantity or number of a commodity or finished article, either carried in stock or easily obtainable

on the market, and the furnishing of which would not be affected by contracts with other parties. Such, however, was not the situation in the case at bar.

The evidence in this case involved elements of actual and probable cost which, under the authorities had an important bearing upon the determination of the amount of damages, and should have been taken into account by the jury in arriving at its verdict. The trial court, however, failed and refused to allow or give proper instructions covering these elements.

Among the matters so withheld from the consideration of the jury was that of deduction from the amount of estimated damages, on account of plaintiff's release by the stoppage of work from the burdens and responsibilities and chances of diminished profits, or of absence of profit, that would have attended the completion of performance of the alleged contract.

The alleged contract provided that delivery of the steel was to be made within a specified time after the receipt of the drawings which have been referred to, and contemplated that the steel was to be fabricated, not as a single, continuous operation, but from time to time, upon the completion of the various drawings, which were to be prepared by one J. D. Snedberg, representing the architect and also the Richelieu Realty Syndicate, with which plaintiff in error had contracted to construct the Columbia Theater building. Because of

various reasons for which plaintiff in error was not responsible, the preparation of the drawings went along very slowly. In a letter from S. B. Harding, president of defendant in error, to Thomas Vigus, general manager of plaintiff in error, dated February 12, 1907, (Defendant's Exhibit E, Tr. p. 223), about three weeks after the alleged execution of the contract in question, the writer stated that Mr. Smedberg had "approved three detail drawings thus far and we judge that there will be from 75 to 80 drawings on the building". And further on in that letter it is said:

"This job of about 1200 tons is going to drag for months at this rate, and we will have to put other work in its place if we do not get a complete starting point at once."

It further appears from the evidence without contradiction (Tr. pp. 234, 167) that all of the drawings completed in April, 1907, when the order was given to stop work on the steel for the Columbia Theatre job, did not cover more than 256 tons. It was also shown that the plaintiff had fabricated only $39\frac{1}{4}$ tons of steel when, on April 8, 1907, it received the order to stop, it having begun the fabrication of steel under the alleged contract, in January, 1907. In this connection Samuel B. Harding, president of plaintiff company, further testified:

"Between the dates the plaintiff began fabricating steel for this contract and the date it stopped, it had a few other small orders mixed in with it. We had other work. These orders

filled about a quarter or a third of our capacity.
 * * * To fulfill the contract set out in plaintiff's complaint, one-third of the works of the Modern Steel Structural Company would be required for from sixty to ninety days after April 1, 1907, the plaintiff received and carried out contracts. * * * We did not work after April, 1907, the day on which I received the telegram to stop * * * (Tr. pp. 157, 162).

"The further execution of this contract, after the delivery of the $39\frac{1}{4}$ tons, would require one-third of the capacity of plaintiff's plant and one-third of the office force, as well as the attention of the superintendents of the various departments, the general managers, and the executive officers of this company, for a period of from sixty to ninety days" (Tr. p. 165).

If the progress made with the drawings at the time the work was stopped, as shown by the evidence above, is taken as a basis for an estimate as to time of completion, plaintiff's guess of from sixty to ninety days was far too small. The evidence showed that, under the conditions existing as regards the preparation of the drawings—conditions for which plaintiff in error was not responsible or chargeable, and which the defendant in error had knowingly accepted—the completion of the drawings might have been delayed for a much longer period than that estimated by Mr. Harding.

By the stoppage of all work under the alleged contract the defendant in error was thereupon freed from all of the delay, risk, annoyance and uncer-

tainty which would have been incident to completion of the job under conditions such as those complained of in plaintiff's letter to defendant of February 12, 1907 (Tr. pp. 222-224), and in the plaintiff's letters of January 25th and 31st (Tr. pp. 188-189, 196) and such as would attend the performance of a contract extending over a considerable portion of time. The profits, if any, arising from a delayed and protracted performance would obviously be much less than those which would be derived from prompt and continuous performance.

In view of the foregoing evidence, and of other similar facts shown by the record, we submit that the element of time saved to plaintiff by its release from further performance was a very substantial one, and should have been covered by the court's charge to the jury. This element was covered by the requested instructions of plaintiff in error numbered VI, VII and IX (Tr. pp. 258-259; Assignments of Error Nos. XVI, XVII and XIX); but the court refused to give the same, and did not cover the subject at all in the charge to the jury.

That the element referred to is a substantial one which should be taken into consideration by a jury in estimating damages in a case of this kind, is established by decisions of the highest authority.

See

U. S. v. Speed (supra);

Hinckley v. Pittsburg Bessemer Steel Co.,
121 U. S. 264,

and authorities cited in earlier portion of this brief.

The charge of the court was incorrect and inadequate in the further particular that the jury were not properly instructed as to the caution to be observed in estimating the amount of damages where the tangible facts offered as a basis for arriving at such amount were so incomplete and uncertain. Because of the unfinished condition of the drawings and the delay and uncertainty that were attending the completion of the alleged contract, there was a marked absence, in this case, of the kind of facts and data which the authorities regard as necessary in the ascertainment of legal damages. The situation shown at the close of the evidence was one calling urgently for cautionary instructions as to the necessity for satisfactory evidence of the various elements affecting cost, and for the avoidance of speculation or surmise in determining the question of damages. By defendant's requested instructions numbered II, III and IV (Assignments of Error Nos. XII, XIII and XIV; Tr. pp. 256-258; 281-282) defendant sought to have the jury instructed as to these matters, but the requested instructions were refused, and no adequate instruction of a similar nature was given by the court. That instructions of this kind, as applied to facts similar to those shown in the present case, are proper and necessary, is well established by the authorities:

On this subject, see the language of the court in the leading case of *Masterton v. Mayor*, 7 Hill, 61;

42 American Decisions, 38, at page 45, and the other authorities heretofore discussed.

In view of the evidence shown in this case, another serious omission in the charge to the jury was the trial court's failure to give instruction numbered X (Tr. p. 259); Assignment of Error No. XX, Tr. p. 285), or to give any instruction of a similar nature. By the requested instruction the jury were told, in substance, that if they should find there was a contract, it was nevertheless the duty of defendant in error not to allow its plant to remain idle, but to use every reasonable effort to procure other work and if it did procure other work to take the place of the work mentioned in said contract, during the time it would be employed in the performance of this contract, the jury should deduct the amount of profits made by it on such other work from any sum the jury might find defendant in error was entitled to under the facts of the case.

As shown by the evidence previously quoted, the capacity of the plant in 1907 was 80 tons per day. S. B. Harding testified that, to fulfill the alleged contract one-third of the plant would be required for from sixty to ninety days after April 1, 1907 (Tr. p. 157 et seq.). This testimony was of course on the assumption that the drawings were completed; but as we have previously shown, at the rate of progress made up to April 1st, it would have

taken some months to finish the drawings alone. In view of the evidence referred to, showing the limited capacity of the plant, and that the job was going to be a long-drawn-out one, it is apparent that the work would have been performed but a little at a time, and, consequently, that the defendant in error could in all probability, within the period likely to be required for full performance, have obtained other work to replace all or a large part of the work that would have been performed under the alleged contract had it not been breached. That the court's omission to give the instruction referred to, or a similar one, was an error, is supported by the following, among other authorities:

In *Page on Contracts*, Section 1583, it is said:

“It is the duty of the party not in default to use such means as a reasonable and prudent man would use to mitigate damages. On the one hand the party not in default cannot recover for damages which follow a breach, but which might have been prevented by such means. * * *”

See also,

Rochm v. Horst, 178 U. S. 1, at pp. 11, 15,
20, 21;

Sedgwick on Damages, (9th edition), Section 201.

In the opening portion of this brief assuming for the purposes of the argument the existence of the alleged contract, and taking as a basis the figures of actual cost, shown on plaintiff's cost

sheet of the $391\frac{1}{4}$ tons of material delivered at the time work was stopped, we showed that the profit derived from the alleged contract, on a 1200-ton basis (being the basis mentioned in several of plaintiff's letters (Tr. pp. 224, 227) would not have exceeded \$475.97 if "*overhead expenses*" were chargeable to costs. This on the figures and testimony, of defendant in error. And after making deductions for depreciation, cost of materials, drawing, templates, power, allowance for exemption from risk and trouble attendant upon full performance of a long-drawn-out contract the apparent profit would be swept away and would become a heavy loss.

In the brief for defendant in error (Tr. pp. 75-78) these figures and results are criticized and are amended so as to show that a much larger profit would have been obtained by plaintiff, on the basis of the figures in the cost sheet. This result is obtained by defendant in error (1) by changing the relative tonnage of the theatre portion and the office portion, (2) by assuming a larger proportion of drawings completed at the time work was stopped, and (3) by eliminating, *as a supposed duplicate estimate, the figure of \$4.10 per ton mentioned in our figures as the cost of drawing labor for the theatre portion.*

We shall discuss these criticisms in their order:

1. *As to relative tonnage of office portion and theatre portion.*

In the brief for defendant in error it is contended that our statement that fifty per cent in weight of the building belongs to the theatre portion is a serious error; and the testimony of F. W. Harding is quoted to the effect that from 30 to 50 per cent of the building, according to the open space on the plans, would be occupied by the theatre, and that the tonnage of the theatre portion would not exceed 20 per cent of the whole work in the building; and that, on the basis of a 1200-ton building the steel tonnage would be, for the office portion 950 tons and for the other portion 240 tons.

From the testimony of F. W. Harding it is very doubtful whether he had the technical training or experience necessary to qualify him to give a dependable estimate of tonnage. At all events he had not been accustomed to making such estimates; and his testimony clearly indicates that his supposed estimates of tonnage in this case were really not estimates but guesses of the vaguest character.

The witness testified that he was vice-president of plaintiff company, which office he had held "for the past three months"; prior to which time he was treasurer for five years, having been elected to that office in 1907, when he was directing manager and one of the directors. He further said:

"I have done a great deal in behalf of my company in taking contracts, although it never became part of my duty to remember quantities, but I was required to place valuations on work. The estimating of quantities would be done by our clerical force" (Tr. p. 182).

But aside from the question of the witness's ability to estimate quantities, it appeared from his own testimony that his estimate of the quantity of material required for the theatre portion or for any portion of the building in question had no tangible basis to support it. Thus, in reference to his estimate of tonnage for the completed building, he said:

"I could not take the quantities to determine that. I had to take the cubic foot rule, because the general drawings were not completed for the entire building. The building was a combination of both office and theatre building. * * * There were some store buildings in the bottom or in the first story, and then came the theatre portion of which there was quite a lot of open space where the theatre portion was, and above that, and I think partly on the sides, was more or less office construction. That is in a general way, as I remember it" (Tr. p. 201).

"The papers that are annexed to the deposition of S. B. Harding are all of the detail drawings and are all of the drawings that were prepared by the plaintiff, and the 31 and 28 sheets of drawings that have been offered in evidence, and which were annexed to the deposition of S. B. Harding, are only for the first part, that is, the stores and first and second story columns and some of the connecting beams. They more or less refer to the office building proper and none of the truss work for the theater proper had been done (Tr. pp. 201-2).

And at page 227 the witness further testified:

"In a general way we knew that it was to be a steel frame structure of so many cubic feet, and taking the cubic-feet rule we arrived at the tonnage."

That the so-called cubic-feet rule affords no valid basis for the estimation of quantities in a case of this kind, the only accepted basis for such estimates being the detail drawings, seems to us an obvious proposition. At all events, this is clearly shown by the testimony of the witnesses for defendant, structural engineers who were thoroughly familiar with the design and construction of theater and office buildings, and who were not parties to or interested in the result of the action. The testimony of these witnesses was not disputed and was based upon a careful examination of all of the drawings and other exhibits attached to the deposition of S. B. Harding. All of these witnesses testified, in substance, that there were no drawings or designs from which it was possible to determine the tonnage that would go into the building in question. C. H. Snyder, a contracting engineer of 12 years' experience, who had formerly been a structural steel draftsman, and who had in the last 12 years estimated the quantities and given prices and quotations for the work on 60 or 70 buildings, among them several theaters, testified (Tr. p. 246) that the theater portion would occupy more than half of the ground space and up to the sixth story of an eight story building.

John D. Galloway, a civil engineer,—that term including, according to his statement, structural engineer,—testified that he had been in the business for 23 years, and had designed the steel work for several

buildings and prepared the detail drawings for the steel work. He further testified:

“The plans are incomplete, but, assuming the information to be correct that this portion was to be occupied by a theater, so far as the cubical contents were concerned, the theater would have occupied considerable more than one-half of the building. In addition to the portion which is bounded by the curved line that I speak of, I would say that the curved line would indicate that this is the portion formed by the galleries of a theater, and it is necessary to have, back of those galleries, there is aisles and foyers and places which are taken up by the exits. With those ideas, I would say that the space shown would be taken up in this way, and that that part to be occupied by the theater would have been considerably more than fifty per cent. I should judge, without any actual measurement, that at least 75% of it would have been the theater portion” (Tr. pp. 247-249).

From the foregoing testimony we submit that the assumption of defendant in error that the tonnage of the theater portion was only 240 tons had no foundation on which to rest.

2. *As to the portion of the drawings that were prepared when work was stopped, and the estimated cost of completing the remaining portion.*

The assertion of defendant in error that “the expense of the drawing work for the office portion of the building had practically all been taken care of” is not supported by the testimony. The testimony of W. M. Breite, for 20 years a structural en-

gineer and who had designed steel work for a large number of theater and other buildings, was that the completed drawings attached to the deposition of S. B. Harding, included in all 256 tons, and "only covered the office portion of the proposed building." The assertion in the brief for defendant in error that "owing to the fact that in an office building the structural work of each floor is practically the same, most of the detail drawings which were gotten out for the first floor would serve equally well for the others above, with the possible exception of the 8th floor", is based upon an assumption that is not supported by the evidence, either as a general proposition or as applied to this particular case, While Mr. F. W. Harding claimed in his testimony (Tr. p. 254) that there was "considerable duplication" it is to be remembered that he also testified (Tr. p. 225) that

"until we have that design (from the architect) we don't know what the members are going to consist of absolutely. If we were engineers we could, otherwise we cannot use our own judgment in a matter of that kind. We have to wait for the architect".

No structural engineer testified for defendant in error on this point, and therefore in support of the intimation that by reason of the completed drawings the cost of the remaining drawings would be decreased because of duplication, we have only the vague assertion of an officer of defendant in error, confessedly not qualified to speak upon this sub-

ject. As against this, we have the testimony of Breite, Zucco, Galloway and Snyder, structural engineers with long experience, to the effect that about 10% of the detail drawings for the work had been completed.

We therefore insist that the estimate in our opening brief of \$6692.80 as the cost of drawing work is supported by the evidence and is correct.

3. *As to the figure of \$4.10 per ton for drawing labor of theatre portion (brief of plaintiff in error, p. 94).*

In the brief for defendant in error it is said (p. 77):

“Counsel’s claim for generous treatment in his analysis, in that he is only charging \$4.10 per ton for the detailed drawings of the theater portion, when F. W. Harding had stated it might be \$5.00, becomes more apparent than real when we find him adding per ton in this statement, \$4.10 to \$6.00 and over, which had already therein been charged in the figures \$6,692.80 as the drawing cost; making nearly \$10.00 per ton for the theater drawing details, a figure largely in excess of that named by defendant’s most enthusiastic witness.”

On the theory that our figures based on the “cost sheet” duplicated the sum of \$4.10 in the drawing costs this sum is omitted in the figures made by defendant in error.

Counsel have erred grievously. They misunderstand our figures. Our estimate of the drawing costs fixed \$6692.80 as the total drawing cost for an ordi-

nary store and office building containing twelve hundred tons of steel. But the building in question was a combined office and theatre building of which the "theatre" constituted at least one half. And the evidence shows that the drawing work for a theater is more difficult, and the drawing costs for such work are at least \$4.10 per ton more than for the other class of work. (Testimony W. W. Breite, Tr. pp. 236-237; J. Galloway, Tr. pp. 248-249; C. Snyder, Tr. p. 242.)

4.

Plaintiff in error was not estopped from requiring legal proof of the alleged damage or from urging the invalidity of the contract.

It is indeed novel to contend that in an action for breach of contract the party in default may not require legal proof of the alleged damage to the complaining party. It is so unique that there is no authority to support this contention. Its absurdity is apparent from its mere statement and would not be noticed had not defendant even cited in its support the case of

Seymour v. Oelrichs, 156 Cal. 782.

An examination of the case cited will show that it is not applicable to the case at bar. In that case, a husband duly authorized to bind his wife and her sister by a contract employing an overseer of the wife's and sister's real estate, agreed to employ

the plaintiff, Seymour, for ten years at a specified monthly salary, and thereby induced Seymour to surrender a life position in the San Francisco Police Department and to enter on his duties as overseer. Seymour would not have left the life position unless he had been assured of a permanent position, and the husband knew that fact. Every one of the terms of the agreement between himself and Seymour had been defined and understood by them, orally. Under these circumstances, the court held that the wife and sister were equitably estopped from repudiating the oral contract on the ground that it was not reduced to writing as required by the statute of frauds.

Here, however, the terms of the agreement never were fully agreed upon between the parties. As has been pointed out, the defendant in error, just prior to the time it was alleged the contract was entered into, was fully aware of the incomplete nature of a contract to furnish material without existing drawings and specifications and that until they were definitely understood and outlined, defendant in error did not have a "starting point" (Tr. pp. 87-224-227). It knew this, but went ahead and took the chances, as the American Pacific Construction Company necessarily did in its relations with the Richelieu Realty Syndicate. The matter of completing the drawings rested between the defendant in error and J. D. Smedberg who represented, not the plaintiff in error, but the architect and the Richelieu Realty Syndicate (see specifications,

Tr. p. 107; deposition S. B. Harding, Tr. p. 104). Notwithstanding the incomplete condition of the drawings and specifications and the situation in which the plaintiff in error was placed by the change of the financial condition of the Richelieu Realty Syndicate, plaintiff in error endeavored to reach an adjustment with the defendant in error at the time the order was given to stop the fabrication of steel and for some time thereafter.

The case of *Seymour v. Oelrichs* has no application here for the reasons stated and for the additional reason that independent of the invalidity of the contract the law required proof of the alleged damage.

Conclusion.

The character of the action and the necessity of quoting the evidence is our excuse for the great length of this brief. A complete treatment of all the material parts required unavoidable repetition.

However, it is respectfully submitted that every point suggested by the defendant in error has been met squarely, and fully answered. It is also submitted

1st. That the alleged contract is void because:

(a) The drawings and specifications were never completed.

(b) The reference in the “*proposal*” to identified specifications is false. No such specifications are in evidence.

(c) No specifications were attached to the “*proposal*”.

2nd. There is no evidence that defendant in error was damaged.

3rd. That the contract sought to be proved was different in its essential terms from the contract alleged.

4th. That the action should not have been instituted until after the differences between the parties had been submitted to arbitration.

It is finally submitted that the record shows that this action is really an effort on the part of the defendant in error to coin the misfortunes of the Richelieu Realty Syndicate and of plaintiff in error into money for damages which it never sustained.

Upon the grounds and reasons set forth in this brief we respectfully ask that the judgment of the court be reversed.

Respectfully submitted,

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LENT & HUMPHREY,
Of Counsel.



